CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No 321.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ANDREW HERMAN, A MINOR, BY HIS NEXT FRIEND, MARTIN HERMAN, AND THE UNION TERMINAL RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MAY 2, 1902.

(18,523.)

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a-2 Be it remembered, that on the 18th day of September, A. D. 1897, the plaintiff above named commenced his action in the above-named court, against the above-named defendant, by filing in the office of the clerk of said court his petition; a copy of said petition being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN Herman, Plaintiff,
vs.
THE UNION TERMINAL RAILWAY COMPANY and KANSAS City Suburban Belt Railway Company, Defendants.
} No. —.

Petition.

Andrew Herman, a minor, who sues by his next friend, Martin Herman, complains of defendants, and for his cause of action alleges:

1. That during all the times hereinafter refer-ed to the Union Terminal Railway Company was and is a corporation, organized and existing under and by virtue of the laws of the State of Kansas, and during all of said times owned and operated a line of railway into and through the city of Kansas City, in Wyandotte county, Kansas.

2. That the defendant, Kansas City Suburban Belt Railway Company, was, during all of said times, a railway corporation, organized and existing under and by virtue of the laws of the State of Missouri, and during said times operated its trains upon and controlled the railway of the defendant, The Union Terminal Railway Company, in connection with the latter company.

3 3. That the said Union Terminal railway crosses the Kansas river over a bridge at Ohio avenue, in said city, running west, and at the west approach to said bridge makes a long curve to the south, running along the west bank of said river upon an embankment and trestle-work, and crosses Central avenue, in said city, at grade, but a short distance south of Central avenue it runs upon piles to a considerable elevation; that about one hundred fifty yards north of where its main track crosses Central avenue a spur track leads out south, the switch stand being upon the high embankment aforesaid, the said spur track being used for holding dead cars; and said spur track also crosses Central avenue at grade, about six feet away from the main track.

4. That about the center of said Central avenue, a private switch, belonging to the Metropolitan Street Railway Company, leads from the said spur track to the power-house of the said street railway, over private ground belonging to said street railway company, which ground was formerly a public alley, but was vacated in 1896, and said private switch was and is used for the purpose of switching coal cars to said power-house.

5. That on the 13th day of August, 1897, at the time the injuries hereinafter complained of were received, and just prior thereto, an empty coal car had been standing upon said private switch, at the corner of said power-house.

6. That the switch connecting the aforesaid spur track of the defendant The Union Terminal Railway Company with its main track was, at the time of the injuries complained of, and for a long time prior thereto had been defective in construction, and out of repair, in these particulars, that is to say:

4 The joints in the rails, near the switch, were loose, causing a jolting of the switch when cars passed over them, rendering said switch liable to open, or be opened by passing trains; and said rails were not properly spiked and secured in their places with rail braces, to prevent them from spreading, so that passing trains were liable to and did open, or partially open said switch, and cars, backed upon the main track, instead of following the main track would leave the same and follow the switch; and further, in this:

That the switch points on the rails at the said switch were broken off, one of them to the extent of several inches, and were so blunt and dull as to cause trains moving over them to ride the switch and leave the main track; and said switch was further defective, in this: that the bridle bar, or connecting rod, was not provided with a spring to hold the switch point against the side of the rail, so that when trains were passing over the main track, in the absence of any spring as aforesaid, the switch point did not lie close against the rail, and cars, instead of following the main track, rode said switch; and in addition, the rails where the switch point lay against them, were not made concave, so as to permit the point of the switch to lie close up against the rail.

7. That the defective condition of said switch was well known to said defendant companies, and had on several occasions caused wrecks of freight trains at the same place.

8. That on the 13th day of August, 1897, about three o'clock p. m. the said Andrew Herman, a child of tender years, to wit: four years of age, in company with another child of about the same age, was returning upon an errand, and had crossed the Kansas City Elevated Railway bridge over the Kansas river at Central avenue, and, in order to avoid the approaching train, backing south upon the

5 main track, said Andrew Herman crossed over said main track and spur track, and was walking across the private grounds of the Metropolitan Street Railway Company, aforesaid, and was about to pass said empty coal car standing upon the Metropolitan coal switch, and was going in the usual and most direct route to his home, over a pathway used by the public, when he was struck down and run over by said coal car, which had been, as aforesaid, standing upon said switch, and his right foot and ankle were so mangled and crushed that it was necessary for the surgeons to amputate his foot and ankle, in order to save his life, which was done on the said 13th day of August, 1897.

9. That said injuries were caused wholly by the negligence and carelessness of the defendant companies, their agents and servants, and under the following circumstances:

At the time the injuries were received, the defendant, Kansas City Suburban Belt Railway Company, was engaged in pushing ahead a long, heavy train of freight cars, said train containing upwards of fifty cars, going south, with the engine in the rear, the engine, at the time, being about midway of the curve west of the Ohio Avenue bridge, and said train was moving at considerable speed, to wit: about twenty miles an hour, in order to make headway sufficient to run up the incline south of Central avenue. Through the negligence and carelessness of the defendant companies the switch north of Central avenue connecting the spur track with the main track, was not only in defective condition and our of repair, as above set forth, but had been left unlocked and partially open, so that when the heavy train passed over it while the first car kept upon the main track, the rear trucks of the second car left the main track and ran to Central avenue, off of both tracks, and the third car and
6 the cars behind it ran upon the spur track, either riding over the switch points or opening the switch, and at Central avenue, said train still continued in motion, a number of the cars were thrown into confusion and wrecked, some part of them striking the empty coal car, standing, as aforesaid, upon the Metropolitan switch, and pushing the same violently and without warning over and upon the said Andrew Herman, causing his injury, as aforesaid.

10. Plaintiff says that the defendants were further guilty of negligence in pushing ahead a long train of cars around a curve at such speed and under the circumstances and at the time and place; that Central avenue, where the wreck occur-ed, is one of the most public places in said city, and is a much-traveled place, being the principal and only thoroughfare leading from that part of the city to the Central Avenue bridge over the Kansas river to old Kansas City, Kansas; that on account of trees and houses on the east side of the aforesaid curve it was not possible for the engineer to see the head end of his train, nor for him to ascertain promptly that the cars had left the main track in time to stop his train until after the train had gone a distance of over two hundred yards, and the injuries aforesaid were caused; and that the defendants were further negligent in failing to provide a sufficient number of brakemen for said train, to watch for such accidents and signal the engineer.

11. That said injuries were caused as aforesaid, by all the aforesaid acts of negligence and carelessness of the defendant companies contributing thereto.

12. That by reason of the aforesaid injuries the said Andrew Herman has been damaged in the sum of ten thousand dollars.

7 Wherefore he prays judgment against the said defendants, The Union Terminal Railway Company and Kansas City Suburban Belt Railway Company, for said sum of ten thousand dollars, and his costs.

ANDREW HERMAN,
A Minor, by His Next Friend,
MARTIN HERMAN.

By SILAS PORTER,
Plaintiff's Attorney.

STATE OF KANSAS, } ss:
Wyandotte County, }

Martin Herman, being first duly sworn, deposes and says that he brings this suit for Andrew Herman, a minor, as his next friend; that said Andrew Herman is an infant, four years of age, son of the said Martin Herman; that affiant has read the foregoing petition, and knows the contents thereof, and said affiant does solemnly swear that the cause of action set forth in the petition hereto prefixed is just, and that by reason of the poverty of himself and the said Andrew Herman, both he and the said Andrew Herman are unable to give security for costs.

MARTIN HERMAN.

Subscribed and sworn to before me, this 18th day of September.

[SEAL.] W. C. HOWLETT, *Clerk.*

Præcipe.

Clerk:

Please issue a summons in the above cause directed to the sheriff of Wyandotte county to execute returnable according to law. Pl'ff sues for $10000 damages.

SILAS PORTER,
Pl'ff's Att'y.

8–18 Endorsed: In the court of common pleas of Wyandotte county, Kansas.—No. 3042.—Andrew Herman, a minor, by next friend, *vs.* Union Terminal R'y Co., and K. C. Suburban Belt R'y Co.—Filed September 18th, 1897.—J. W. Howlett, clerk.—Petition *a præ.*

19 And thereupon, upon the 18th day of October, 1897, the defendant, Kansas City Surburban Belt Railroad Company filed with the clerk of said court, its petition for removal of cause to United States circuit court; said petition being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN Herman, Plaintiff,
vs.
THE UNION TERMINAL RAILROAD COMPANY and KANSAS CITY Surburban Belt Railroad Company, Defendant-.

Petition of Defendant Kansas City Suburban Belt Railroad Company for Removal of Cause to United States Circuit Court.

Your petitioner, Kansas City Suburban Belt Railroad Company respectfully shows to this honorable court that it is the defendant

in this suit, which is of a civil nature, and that the matter and amount in dispute in this cause exceeds the sum or value of two thousand dollars, exclusive of interest and costs, and that the controversy herein is between citizens of different States; that the plaintiff, Andrew Herman, and his next friend, Martin Herman, are citizens of the State of Kansas, residing in Wyandotte county, Kansas; that defendant, The Union Terminal Railroad Company is a corporation organized under the laws of the State of Kansas and your petitioner, Kansas City Suburban Belt Railroad Company was at the time of the commencement of this suit and still is, a
20 citizen and resident of the State of Missouri (being a corporation organized under the laws of said State, and none other) and is a resident of the city of Kansas City, Jackson county, in said State, and is not a resident or citizen of the State of Kansas and a controversy exists between the plaintiff herein and your said petitioner entirely separable and distinct from the cause of action between plaintiff and defendant The Union Terminal Railroad Company, for the following reasons, to wit:

1. Defendant, The Union Terminal Railroad Company, owns, repairs and maintains the railroad mentioned in plaintiff's petition. Your petitioner has no interest therein, except that it has leased same and pays certain yearly rental for the use of said tracks. All of the locomotives, engines and cars running over said railroad are the property of your petitioner, or subject to its control. Defendant Terminal Company has no control over the operation of trains and has no employees in train service. Defendant The Union Terminal Railroad Company is responsible for the condition of the track and your petitioner, and none other, for the acts and doings of all persons operating trains.

2. The plaintiff herein has declared upon two distinct causes of action: First: For maintaining a defective switch and; second: For negligent operation of a train of cars, the first of which, if true, is negligence chargeable against defendant The Union Terminal Railroad Company and the second, if true, is negligence chargeable against your petitioner.

3. The train of cars mentioned in the petition was operated by your petitioner as averred. All of the parties in charge thereof were in your petitioner's employ and none other.

4. By reason of the foregoing your petitioner says that whatever cause of action plaintiff has for negligent operation of said
21 railroad train lies against your petitioner exclusively.

Your petitioner offers herewith good and sufficient surety for its entering in the circuit court of the United States aforesaid on the first day of its next session, a copy of the record in this suit and for the payment of all costs that may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully and improperly removed thereto.

Your petitioner therefore prays that the said sureties and bond may be accepted; that this suit may be removed into the next circuit court of the United States to be held in the district of Kansas, first division, at Leavenworth, pursuant to the statutes of the United

States in such case made and provided, and that no further proceedings may be had herein in this court.

TRIMBLE & BRALEY AND
JOHN A. EATON,
Attorneys for Defendant, Kansas City Suburban Belt Railroad Co.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

John G. Park of lawful age, being duly sworn upon his oath, states that he is attorney of The Kansas City Suburban Belt Railroad Company, defendant in this cause, and on its behalf makes this affidavit; that he has read the above and foregoing petition and that the facts stated therein are true.

JOHN PARK.

Subscribed and sworn to before me this 18th day of October, 1897.

My commission expires August 12th, 1899.

[SEAL.]

CARY S. DENNY,
Notary Public in and for Jackson County, Missouri.

22–24 Endorsed: No. 3042. Andrew Herman a minor, by his next friend, Martin Herman, *vs.* The Union Terminal R. R. Co. and Kansas City Suburban Belt Railroad Company.—3323.—Petition of Kansas City Suburban Belt R. R. Co., for removal of this cause to United States circuit court.—Filed Oct. 18, 1897.—J. W. Howlett, clerk, by F. L. Kenny, deputy.

25 And thereupon, upon the 18th day of October, 1897, the defendant, Kansas City Suburban Belt Railroad Company filed in the office of the clerk of said court its bond for removal; said bond being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN HERMAN, Plaintiff,
vs.
THE UNION TERMINAL RAILROAD COMPANY and KANSAS CITY Suburban Belt Railroad Company, Defendants.

Bond for Removal.

Know all men by these presents: that the Kansas City Suburban Belt Railroad Company, a corporation of the State of Missouri, as principal, and H. E. Chadborn and Billy Schwertz, as sureties, are held and firmly bound unto Andrew Herman a minor, suing by his next friend Martin Herman, in the sum of two hundred and fifty dollars, ($250.00) for the payment whereof, well and truly to be made unto the said Andrew Herman, his heirs, representatives and assigns, we bind ourselves, our successors and assigns, firmly *to be* these presents,

Upon condition nevertheless that,

Whereas, the said plaintiff has filed its petition in the above court for the removal of a certain cause therein pending, wherein Andrew Herman, suing by Martin Herman, his next friend, is plaintiff and
The Union Terminal Railroad Company and Kansas City
26 Suburban Belt Railroad Company are defendants, to the circuit court of the United States for the district of Kansas, first division, at Leavenworth, and has alleged in its said petition that there is a separable controversy existing between the said plaintiff and principal herein,

Now if the said defendant, Kansas City Suburban Belt Railroad Company, shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of United States, if said circuit court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void. Otherwise it shall remain in full force and effect.

In testimony whereof, the said defendant, Kansas City Suburban Belt Railroad Company, has caused these presents to be executed by its duly authorized officers, and the said sureties have hereunto set their hands and seals this 18th day of October, 1897.

KANSAS CITY SUBURBAN BELT
RAILROAD COMPANY,
By E. L. MARTIN, *President.*

Attest:

H. E. CHADBORN, *Surety.* [SEAL.]
BILLY SCHWERTZ, *Surety.* [SEAL.]

Endorsed: No. 3042.—Andrew Herman a minor, by his next friend, Martin Herman, *vs.* The Union Terminal R. R. Co., *et al.*—Removal bond.—Filed Oct. 18, 1897.—J. W. Howlett, clerk. By F. L. Kenny, deputy.

26*a*–53 And thereafter, at a session of the said court for the regular February term, 1898, thereof, all the officers of said court being present as before, the following further proceedings were had in the above-entitled cause, which were duly entered of record upon the journal of said court, in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, Plaintiff,
vs.
THE UNION TERMINAL RAILWAY COMPANY and THE Kansas City Suburban Belt Railway Company, Defendants. } No. 3042.

Journal Entry.

FEBRUARY 5TH, 1898.

And now, on this day, this cause comes on for hearing on the motion of the defendant for removal to the United States court, for the

reasons set out in said motion. The court, after hearing the arguments of counsel and being well and fully advised in the premises doth overrule said motion.

* * * * * * *

53*a* In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, Plaintiff,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY and The Union Terminal Railroad Company, Defendants. } No. 3240.

Journal Entry of First Trial.

OCTOBER 18TH, 1898.

And now, on this day, this cause comes regularly on for trial, plaintiff appearing by Sutton and Silas Porter his attorneys, and defendant- appearing by Miller & Morris and Eaton their attorneys.

And now, to try the issues joined herein, comes the following jury, to wit: J. R. Chandler, J. H. Olliges, John Llson, Allen Garner, George Converse, F. M. Rice, A. G. Olson, F. Fantick, J. D. Brown, F. J. Reinhart, E. R. Allen, D. M. Ward, twelve good and lawful men from the body of Wyandotte county, qualified to serve as jurors herein, and tried and sworn to well and truly try the matters and things to them submitted herein, and a true verdict render according to law, and the evidence, and the trial of this cause was proceeded with, and such trial not being completed at the hour of adjournment, the jury were duly admonished by the court as to their duties as jurors, and excused until the 19th day of October, A. D., 1898, at 9.30 o'clock a. m., to which time the further consideration of this cause is postponed.

It was thereupon ordered that the court be and the same was adjourned until the 19th day of October, A. D., 1898, at 9.30 o'clock a. m., of said day.

53*b*

OCTOBER 19TH, 1898.

And now on this day, the court having met pursuant to adjournment, came the parties hereto present as before, and the jury having been duly called and all being present, the trial of this cause was proceeded with, and such trial not being completed at the hour of adjournment, the jury were duly admonished by the court, as to their duties as jurors, and excused until the 20th day of Oct., A. D. 1898, at 9.30 o'clock a. m., to which time the further consideration of this cause is postponed.

It was thereupon ordered, that the court be and the same was, adjourned until the 20th day of October, A. D. 1898, at 9.30 o'clock a. m. of said day.

OCTOBER 20TH, 1898.

And now on this day, the court having met pursuant to adjournment, came the parties hereto present as before, and the jury having

been duly called and all being present, the trial of this cause was proceeded with, and such trial not being completed at the hour of adjournment, the jury were duly admonished by the court, as to their duties as jurors, and excused until the 21st day of Oct., 1898, at 9.30 o'clock a. m., to which time the further consideration of this cause is postponed.

It was thereupon ordered, that the court be and the same was, adjourned until the 21st day of October, A. D., 1898, at 9.30 o'clock a. m., of said day.

OCTOBER 21ST, 1898.

And now, on this day, the court having met pursuant to adjournment, came the parties hereto present as before, and the jury
53c having been duly called and all being present, the trial of this cause was proceeded with, and such trial not being completed at the hour of adjournment, the jury were duly admonished by the court as to their duties as jurors, and excused until the 24th day of October, A. D., 1898, at 9.30 o'clock a. m., to which time the further consideration of this cause is postponed.

It was thereupon ordered, that the court be and the same was, adjourned until the 24th day of October, A. D. 1898, at 9.30 o'clock a. m. of said day.

OCTOBER 24TH, 1898.

And now on this day, the court having met pursuant to adjournment, came the parties hereto present as before, and the jury having been duly called and all being present, the trial of this cause was proceeded with, and such trial not being completed at the hour of adjournment, the jury was duly admonished by the court, as to their duties as jurors and excused until the 25th day of October, 1898, A. D. at 9.30 o'clock a. m. to which time the further consideration of this cause is postponed.

It was thereupon ordered, that the court be and the same was, adjourned until the 25th day of October, A. D. 1898, at 9.30 o'clock a. m. of said day.

OCTOBER 25TH, 1898.

And now on this day, the court having met pursuant to adjournment, came the parties hereto present as before, and the jury haveing been duly called and all being present, the trial of this cause was proceeded with; and now the evidence for the plaintiff and for the defendant is fully heard, and the court, in writing, in-
53d structs the jury as to the law in this cause governing, and arguments of counsel are fully heard, and the jury, in charge of their lawful sworn bailiff, retire to their jury-room to consider on their verdict in this cause to be rendered.

And now the jury notify the court that they have agreed upon a verdict and are brought into open court, and the jury being all present, by and through their foreman, return the following verdict, to wit: Jury disagreed.

And thereupon, the jury are discharged from the further consideration of this cause.

And thereupon all parties being present leave of the court is

given to the plaintiff to file an amended petition herein within twenty days.

54 And thereupon, on the 20th day of October, 1898, the defendant, The Kansas City Suburban Belt Railway Company filed in the office of the clerk of said court, its certain motion to dismiss, a copy of same being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, by His Next Friend, Plaintiff,
vs.
THE UNION TERMINAL R. R. CO. ET AL., Defendants.

Motion to Dismiss.

Now comes the defendant The Kansas City Suburban Belt Railway Company, immediately upon the court's sustaining the separate demurrer of the defendant, The Union Terminal Railway Company, to the evidence of plaintiff, and the denial of this defendant's, The Kansas City Suburban Belt R'y Co.'s petition for removal, and moves the court to dismiss this action as to it, the defendant, Kansas City Suburban — Railway Company for the reason that it appears from the record in this case that this court has no jurisdiction of this action as to this defendant and has no jurisdiction of this defendant in this action.

TRIMBLE & BRALEY,
JOHN A. EATON,
B. N. SIMPSON,
MILLER & MORRIS,
Attorneys for the Defendant K. C. Suburban Belt R'y Co.

Endorsed: 3042.—Andrew Herman &c., *vs.* The Union Terminal R. R. Co. Motion of def't K. C. S. B. R'y Co. to dismiss.—Filed Oct. 20th, 1898. C. W. Litchfield, clerk.

55 In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, by His Next Friend, Plaintiff,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY and The Union Terminal Railroad Company, Defendants. } No. 3042.

Journal Entry.

OCTOBER 19TH, 1898.

And now upon this day this cause being on trial before said court and a jury and now all the evidence for the plaintiff being introduced the plaintiff announced that he closed his case; and thereupon the Union Terminal Railway Company filed its separate demurrer to such evidence, in words and figures as follows:

STATE OF KANSAS, } ss:
County of Wyandotte, }

In the Court of Common Pleas in and for the Said County and State.

ANDREW HERMAN, by His Next Friend, Plaintiff,
vs.
THE UNION TERMINAL RAILWAY COMPANY and THE Suburban Belt Railway Company, Defendants. } No. 3042.

Demurrer to Evidence.

And now comes the defendant, The Union Terminal Railway Company at the close of the evidence of the plaintiff and demurs to such evidence for the reason that the same is not sufficient to establish a cause of action in favor of the plaintiff and against the said defendant, The Union Terminal Railway Company.

TRIMBLE & BRALEY,
JOHN EATON,
MILLER & MORRIS,
Attorneys for Defendant.

And at the same time the Suburban Belt Railway Company filed its separate demurrer to such evidence in the words and fig-
56 ures as follows:

In the Court of Common Pleas in and for Wyandotte County, Kansas.

ANDREW HERMAN, by His Next Friend, Plaintiff,
vs.
THE UNION TERMINAL RAILWAY COMPANY and THE SUBURBAN Belt Railway Company, Defendants.

Demurrer to Evidence.

And now comes the defendant, The Suburban Belt Railway Company at the close of the evidence for the plaintiff and demurs to such evidence, because the same is not sufficient to establish a cause of action in favor of the plaintiff and against the defendant.

TRIMBLE & BRALEY,
JOHN EATON, AND
MILLER & MORRIS,
Attorneys for Defendant.

And now the arguments of counsel upon said demurrers is fully heard and the court being fully advised in the premises, sustains the said demurrer of the Union Terminal Railway Company and enters judgment in favor of said defendant and against the plaintiff for its costs to which ruling of the court the plaintiff at the time excepted.

And at the same time the court overruled the said demurrer of

the Suburban Belt Railway Company, to which ruling the Suburban Belt Railway Company at the same time excepted.

And thereupon, and before any other proceedings were had in said cause the defendant, The Suburban Belt Railway Com-
57 pany, filed and presented to said court its petition, bond and application for the removal of said cause to the circuit court of the United States for the district of Kansas, first division, which petition and bond are as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, by His Next Friend, MARTIN HERMAN, Plaintiff,
vs.
THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY and The Union Terminal Railway Company, Defendants. } No. 3042.

Petition for Removal.

Now comes the Kansas City and Suburban Belt Railway Company and shows to the court that it is now and was at the commencement of this action and ever since has been, a corporation duly organized, incorporated and existing under the laws of the State of Missouri, and that it is and at all such times has been a resident and citizen of said State and is not a citizen or resident of the State of Kansas.

That the plaintiff was at the commencement of this action, ever since has been and now is a citizen and resident of the State of Kansas.

That the defendant, The Union Terminal Railway Company is a corporation duly organized, chartered and existing under and by virtue of the laws of the State of Kansas.

That the plaintiff herein by his petition prosecutes his suit against the said defendant for damages alleged to have been sustained by said Andrew Herman in the sum of ten thousand dollars, whereby the sum or amount in controversy herein is in excess of the
58 sum or value of $2000.00 exclusive of interest of costs.

And the said defendant further alleges that heretofore and within the time required by law, it filed its petition and application with bonds duly approved for removal of this cause to the circuit court of the United States for the district of Kansas, first division which application was refused by this court because in the petition of said plaintiff, the said, The Union Terminal Railroad Company was joined as a defendant in said action, and therefore this cause was not removable under the laws of the United States in relation thereto.

That thereupon the said defendants proceeded to the trial of this cause and at the close of the plaintiff's evidence and after the plaintiff had rested, the said defendants and each of them, filed demurrers to the evidence offered by plaintiff, whereupon said court of common pleas of Wyandotte county, Kansas sustained said demurrer as to

the Union Terminal Railway Company and decided thereby, that there was no cause of action against the said Union Terminal Railroad Company upon the petition herein filed or upon the evidence introduced in support thereof; and overruled the demurrer to the evidence filed by this defendant.

And the defendant further says that no evidence was offered or introduced by plaintiff or attempt made to show a cause of action against said Union Terminal Railroad Company; that said Union Terminal Railroad Company was joined with this defendant fraudulently and for the sole purpose of preventing a removal of this cause to the circuit court of the United States and with no purpose or intent of attempting to show any cause of action against it.

This defendant now here shows to the court that there is a separable controversy and that the plaintiff's cause of action
59 exists against the defendant alone and in nowise against the said defendant, The Union Terminal Railroad Company. That no cause of action ever existed against the defendant The Union Terminal Railway Company, as plaintiff at all times well knew.

And this defendant now here, at the first and next step in the proceedings of this cause after the action of the court upon said demurrers to the evidence, renews its petition and application for removal as by the acts of Congress of the United States in such case made and provided, it is entitled to do, and here now files herein, its bond in the penal sum of two hundred and fifty dollars conditioned upon the said defendant at the next term of the United States circuit court to be held in the district of Kansas, first division to enter in said court a transcript of this case and to pay all costs that may be adjudged against it or arise by reason of this cause being removed if the same be wrongfully removed.

Wherefore, the said defendant, The Kansas City Suburban Belt Railway Company prays this court to take no further action in this cause and that the same be ordered removed from this court into the circuit court of the United States for the district of Kansas, first division.

TRIMBLE & BRALEY,
MILLER & MORRIS,
Attorneys for Defendant Kansas City and Suburban Belt Railway Company.

STATE OF KANSAS, } ss:
Wyandotte County, }

B. N. Simpson of lawful age being first duly sworn on oath says that he is attorney and agent for the Kansas City and Sub-
60 urban Belt Railway Company; that said defendant is a non-resident of and absent from the State of Kansas, for which reason affiant makes this verification for and on its behalf. That he has read and knows the contents of the foregoing petition for removal and that the statement of facts therein contained *are* true.

B. N. SIMPSON.

STATE OF KANSAS, *Wyandotte County,* } ss:

Subscribed and sworn to before me this 19th day of October, 1898.

C. W. LITCHFIELD, *Clerk,*
By F. L. KENNY, *Deputy.*

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN HERMAN, Plaintiff,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Defendant.

Know all men by these presents, that the Kansas City Suburban Belt Railroad Company a corporation of the State of Missouri as principal, and H. E. Chadborn and P. K. Wells, as sureties are held and firmly bound unto Andrew Herman, a minor, sueing by Martin Herman his nex- friend, in the sum of two hundred and fifty dollars, ($250.00) for the payment whereof well and truly to be made unto the said Andrew Herman, his heirs or representatives and assigns firmly by *this* presents upon condition nevertheless that,

Whereas the said plaintiff has filed its petition in the above court for the removal of a certain cause therein pending, wherein Andrew Herman sueing by Martin Herman his next friend is plaintiff
61 and Kansas City Suburban Belt Railway Company is defendant, into the circuit court of the United States for the district of Kansas, first division and has alieged in said petition that there is a diversity of citizenship existing between the plaintiff and Andrew Herman and this petitioner, and that the amount involved in said controversy is over two thousand dollars ($2000.00) exclusive of interest and costs.

Now, if the said Kansas City Suburban Belt Railway Company shall enter in said circuit court of the United States on the first day of its next session a copy of the record in said suit and to well and truly pay all costs that may be awarded by said circuit court of the United States, if said circuit court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void. Otherwise it shall remain in full force and effect.

In testimony whereof the said defendant, Kansas City Suburban Belt Railroad Company, -as caused these presents to be executed by its duly authorized officer and the said sureties have hereonto set their hands and seals this nineteenth day of October, 1898.

KANSAS CITY SUBURBAN BELT RAILWAY COMPANY,
By E. L. MOSHER, *Ass't Secretary.*
H. E. CHADBORN. [SEAL.]
P. K. WELLS. [SEAL.]

OCT. 20TH.

And thereupon, the plaintiff filed the following answer to the petition of Kansas City Suburban Belt Railroad Company for removal of cause and affidavit of Silas Porter attorney for plain-
62 tiff thereto attached, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN HERMAN, Plaintiff,
vs.
THE UNION TERMINAL RAILROAD COMPANY and KANSAS CITY Suburban Belt Railroad Company, Defendants.

Plaintiff's Answer to the Petition of Kansas City Suburban Belt Railroad Company for Removal of Cause.

And now comes the plaintiff by his attorneys and shows to the court that heretofore and at the time the defendant's answer was due in this cause defendant, Kansas City Suburban Belt Railroad Company filed in this court its petition and bond for removal of this cause to the Federal court upon the ground that a separable controversy existed between that defendant and this plaintiff, and that the plaintiff had joined the two companies defendant, for the purpose of holding said defendant, Kansas City Suburban Belt Railroad Company in this court and not in good faith, which petition was by this court denied; that thereupon the said petitioner took the transcript of the pleadings in said cause and filed the same with its petition and bond for removal in the office of the clerk of the United States circuit court for the district of Kansas and that thereafter and on the 28th day of April, 1898, this plaintiff presented to the United States circuit court a motion to remand said cause which was submitted upon arguments and briefs by counsel for said peti-
63 tioner and plaintiff and that thereafter and on the 9th day of May, 1898 the said United States circuit court made an order remanding said cause to this court, that in said petition for removal there was presented on behalf of said petitioner as one of the grounds for removal, the fact as alleged by said petitioner that this plaintiff had made the Union Terminal Railroad Company a defendant for the sole purpose of giving this court jurisdiction, and to prevent a removal of said cause, and that the decision of the Federal court upon said motion to remand was a final — upon that question in favor of this plaintiff.

This plaintiff further answering says that it is not true as alleged in petition filed herein October 19th, 1898, that plaintiff joined the Union Terminal Railroad Company as defendant herein fraudulently or for the purpose of giving this court jurisdiction of the petitioner, but on the contrary plaintiff avers that said action was brought in good faith against both defendants as joint tort-feasors, and that plaintiff believed in good faith that he had a joint cause of action against both defendants and had subpœnas issued for witnesses to

prove directly the responsibilities of the Union Terminal Railway Company for the injuries sustained by plaintiff, but that on account of the removal of a witness from the State, plaintiff was at the last moment unable to obtain certain testimony, which if introduced, would have tended to prove the joint liability of said defendants. That plaintiff has excepted to the ruling of the court sustaining a demurrer to the evidence on the part of the Union Terminal Railroad Company in the trial of this court, for the purpose of preserving his rights in this action against both of said defendants jointly.

That he served written notices upon counsel for the Union
64 Terminal Railroad Company in this action, requiring them to produce upon the trial of this cause all writings showing the relations existing between the two defendants companies in the operation and maintenance of their lines of railroad wher- the injuries were received. That tending the trial counsel for both of said defendants agreed with counsel for plaintiff to admit before the jury the truths showing the relations between said companies, but at the last moment, when it was too late to prove other testimony, refused to do so unless the plaintiff would make admissions of other facts against his interests, which he believed were not true. The counsel for both of said defendants refused and neglected to produce upon the trial the papers notices, but led the plaintiff's attorneys to believe that no such papers existed but that they would admit upon the trial the fact.

Wherefore, plaintiff asks that said petition for removal be denied.

SILAS PORTER.
W. B. SUTTON.

STATE OF KANSAS, }
Wyandotte County, } ss:

Silas Porter, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, that he has read the foregoing answer and knows the contents thereof and they are true.

SILAS PORTER.

Subscribed and sworn to before me this 20th day of October, 1898.

[SEAL.]

C. W. LITCHFIELD,
Clerk Common Pleas of Wyandotte County, Kansas.

OCT. 20.

And thereupon, application for such removal came on immediately to be heard before said c-urt, the plaintiff appearing
65 by his attorneys, Silas Porter and Wm. B. Sutton, and the defendant appearing by its attorneys, John Eaton, B. N. Simpson and Miller & Morris; and no objection being made to the amount, form or sufficiency of said bond, or the sureties thereon, the application for said removal is submitted to the court. And the arguments of counsel being heard, the court overrules said application for removal and orders that the said petition and application

for removal be and the same was denied, and said cause as to said Suburban Belt Railway Company be and the same was retained for trial in said court of common pleas; to each and all of which rulings and orders of the court the said defendant, The Kansas City Suburban Belt Railway Company at the time duly excepted and excepts.

End Jr. entry, pp. 55 to 65.

66 21st day of November, 1898.
Nov. 10th, 1898

And thereupon, upon the [21st day of January, 1899,]* the plaintiff herein filed in the office of the clerk of said court, his amended petition; said petition being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN Herman, Plaintiff,
vs.
KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, Defendant. } No. 3042.

Amended Petition.

Andrew Herman, a minor who sues by his next friend, Martin Herman, complains of defendant in this his amended petition, (leave of court having been first had and obtained to file the same,) and for his cause of action alleges:

That at all the times and dates hereinafter mentioned, said defendant was a railroad company, duly incorporated, organized and existing under and by virtue of the laws of Missouri.

And during said times and dates operated and controlled a line of railway upon the tracks and road-bed of the Union Terminal Railway Company, in the cities of Kansas City, Mo., and Kansas City, Kansas.

That said railway crosses the Kansas river upon a bridge at Ohio Ave., in said Kansas City, Kansas, and runs thence in a southerly direction along the west bank of said Kansas river across said Central avenue in said last-mentioned city at grade.

About 300 feet northerly from Central avenue, a side track equipped with a switch leads out in a southerly direction from the said main track; and nearer to Central Ave., than said
67 switch, another spur or side track leads from said side track before mentioned, in a southerly direction extending to and upon the property of the Metropolitan Street Railway Company, which said spur or side track is also equipped with a switch located in Central avenue.

That on the 13th day of August, 1897, a switching crew composed of an engineer, fireman and three men, one of whom was foreman of said crew and conductor of said train, all in the employ and under the management and control of said defendant, were pushing by

[* Words and figures enclosed in brackets erased in copy.]

means of a locomotive, a train of 28 cars across said bridge along said railroad to a point southerly of Central avenue, along the main track of said road and in the said city of Kansas City, Kansas.

That while running over said switch said cars left the main track, passed onto the side track first above mentioned and from thence onto the side track second above mentioned, and collided with an empty coal car standing upon said last-mentioned track and at the corner of the power-house of the Metropolitan Street Railway Company.

Thereby causing said empty car to strike this plaintiff, throwing him violently upon the ground and upon said track, and said cars passed over him, so bruising, mangling and crushing his right foot, ankle and leg, that the same had to be and was on the same day amputated.

That this plaintiff's injuries were caused solely and entirely by the negligence of the defendant in the following particulars:

1. In pushing said cars at said time and place and under the circumstances at an unreasonable, dangerous and unnecessary rate of speed. To wit: 15 miles an hour.

2. In pushing said cars at a rate of speed prohibited and forbidden by ordinance # 522 of the city of Kansas City, Kansas.

68 3. In pushing said train of cars without sufficient men and in proper places to communicate stop signals with reasonable promptness from the front end of said train to the locomotive in order to avoid injuries to others.

4. In pushing said train of cars at said time and place and under said circumstances without having the brakes on said cars communicate with the locomotive or having other suitable and sufficient means to control and stop said cars at the rate of speed at which they were being propelled.

5. In not observing that the first above-mentioned switch was not in proper and safe condition for the passage of trains when said train reached it and immediately stopping said train.

6. In leaving the switch second above mentioned in such a position as to throw cars from the first-mentioned side track onto the said Metropolitan side track, and thereby causing said train to collide with said empty coal car.

7. In pushing said train of cars at such a rate of speed as to be beyond the control of the men in charge thereof, so that the said train could not be stopped after the signal to stop had been given, until it had collided with said empty coal car.

8. In not communicating stop signals to the engineer with reasonable promptness after the train was derailed.

9. That said switch first above mentioned was out of repair, worn with age, use and previous accidents, and was not securely fastened and locked when said train passed over the same, and since this time bas been repaired and made safer.

That the rails of said main track were not notched to allow the points of the champered rails of the side track to fit closely and securely, and there were no curves in the rails of the main track to

assist the trucks of the cars to keep the main track and to prevent them from riding over said switch.

69 10. That said switch at the time said train passed over it indicated by the position of the switch-lever standing at right angles to the upright of the switch, and the position of the target, that said switch was not securely fastened, which could and would have been seen and known if said crew had exercised ordinary care to discover the same.

11. That said switches were left by the employees and servants of said defendants, in a dangerous and unsafe condition previous to the arrival of said train.

12. That said switch was not held in its place by reasonably safe, secure, suitable and approved appliances for that purpose.

13. That said switche was provided with a lock which could be opened by striking same with a coupling pin or link or any other heavy and convenient substance.

That each and every one of the foregoing facts were well known to this defendant, or by the exercise of ordinary care and foresight could have been known.

That trains had previous to the 13th day of August, 1897, been derailed at or near this point on said track.

That said ordinance before herein mentioned was passed by the city council of Kansas City, Kansas, on the 26th day of September, 1888, and was approved on the 27th day of Sept., 1888, and was at all the times and dates hereinbefore mentioned in full force and effect in said Kansas City, Kansas.

That in and by said ordinance section 2 thereof it is provided as follows:

That it shall be unlawful for any such engineer, conductor, or other person having a railway engine or train of cars in charge, to permit same to be run along any track in said city at a greater rate of speed than six miles an hour.

70 That at the time this plaintiff was injured, he was passing over the crossing at Central avenue and along a much-used and well-traveled pathway, which had formerly been a public alley, of Kansas City, Kansas, but recently vacated and at that time occupied by the Metropolitan Street Railway Company.

That said pathway was ordinarily and commonly used by a large number of persons having occasion to go from their dwelling-houses and Central avenue.

And many other persons having occasion to visit the dwelling-houses situated southerly from Central avenue and westerly from the tracks of said railway.

All of which was well known to this defendant.

That this defendant owed to the plaintiff the duty of operating its railroad with ordinary care, prudence and foresight for the safety and protection of this plaintiff as one of the public using said pathway and the crossing of said railroad at Central avenue in said city of Kansas City, Kansas. Which said duty this defendant failed, omitted and neglected to perform, in the particulars above detailed.

Which said failure, omission and negligence were the direct causes of this plaintiff's injuries.

That immediately prior to his said injuries this plaintiff was a strong healthy and vigorous child for his age. Four and one-half years. That by reason of said injuries he is maimed and crippled for life.

That by reason of the loss of his foot the plaintiff's body will not grow and mature equally on both sides, but the shoulder on the crippled side will become higher than that on the other side and there will be a shrinking and impairment of the muscles
71–74 upon the injured side, which will render plaintiff hereafter less able to earn a livelihood than if he had received such injuries after his body was matured.

That by reason of all the foregoing, this plaintiff has suffered damages to the amount of $1999, for which sum with interest from the date of filing his petition herein; plaintiff prays judgment in his favor against defendant besides costs.

SILAS PORTER,
WM. B. SUTTON,
Pl'ff's Att'ys.

STATE OF KANSAS, }
Wyandotte County, } *ss:*

Martin Herman being first duly sworn, deposes and says he brings this suit for Andrew Herman a minor, as his next friend. That said Andrew Herman is an infant of five years of age and son of said Martin Herman. That affiant has heard and read the foregoing petition and knows the contents thereof and does solemnly swear that the cause of action set forth herein is just; and by reason of his poverty and the said Andrew Herman's poverty, neither he nor the said Andrew Herman is able to give security for costs.

MARTIN HERMAN.

Subscribed to and sworn before me this 10th day of Nov., 1898.

[SEAL.] C. W. LITCHFIELD, *Clerk.*

Endorsed: In the court of common pleas, Wyandotte county, Kansas. No. 3043.—Andrew Herman a minor, *vs.* The Kansas City Suburban Belt Railway Co.—Amended petition.—Filed Nov. 10th, 1898.—C. W. Litchfield, clerk.—Amended by inter-.—Refiled Jan. 21, 1899.—C. W. Litchfield, clerk.

75 And thereupon, upon the 27th day of December, 1898, the defendant herein, Kansas City Suburban Belt Railroad Company filed in the office of the clerk of said court its motion to make petition more definite and certain; said motion being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN Herman, Plaintiff,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Defendant.
} No. 3042.

Motion to Make Plaintiff's Amended Petition More Definite and Certain.

Now comes Kansas City Suburban Belt Railroad Company and hereby moves the court to require the plaintiff to make his amended petition more definite and certain in the following respects, to wit:

That plaintiff be required to state as explanatory of the eleventh act of negligence, set out on the 4th page of said amended petition, which switch is referred to in said action of the two switches mentioned in said amended petition.

2. That plaintiff be required to set out wherein and in what respect said switches "were left by the employees and servants of the defendant in a dangerous and unsafe condition," as stated in section 12 on the 4th page of said amended petition.

KANSAS CITY SUBURBAN BELT RAILROAD CO.,
By TRIMBLE *&* BRALEY,
Its Attorneys.

76 Endorsed: No. 3042.—Andrew Herman, a minor, by Martin Herman, his next friend, *vs.* Kansas City Suburban Belt R. R. Co.—Motion to make petition more definite and certain.—3624.—Filed Dec. 27th, 1898.—C. W. Litchfield, clerk.

77 And thereupon, at a session of said court for the regular September 1898, term thereof, all the officers of said court being present as before, the following further proceedings were had in the above-entitled cause, which were duly entered of record upon the journal of said court, in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN Herman, Plaintiff,
vs.
THE UNION TERMINAL RAILROAD COMPANY and THE Kansas City Suburban Belt Railroad Company, Defendants.
} No. 3042.

Journal Entry.

JANUARY 21ST, 1899.

Now on this day comes on to be heard the motion of the defendant to require the plaintiff to make his petition more definite and

certain for reasons set out in said motion; and the court after hearing arguments of counsel and being well and fully advised in the premises doth sustain said motion. And the plaintiff is given five days within which to file an amended petition.

78 And thereafter and on the 21st day of January, 1899, the plaintiff refiled with the clerk of said court, his amended petition originally filed November 10th, 1898, the same having been amended by interlineation and a copy of same being hereinbefore set out, at page 66.

79 And thereafter, at a session of said court for the regular September, 1898, term thereof, all the officers of said court being present as before, the following further proceedings were had in the above-entitled cause, which were duly entered of record upon the journal of said court in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, Plaintiff,
vs.
THE UNION TERMINAL RAILWAY COMPANY and THE Kansas City Suburban Belt Railway Company, Defendants. } No. 3042.

Journal Entry.

OCTOBER 20, 1898.

Now, on this day, comes on to be heard the motion of the defendant, said railway company, for a removal of said cause to the U. S. court. After hearing the arguments of counsel and being well and fully advised in the premises, the court doth overrule said motion, to which ruling of the court the defendant excepts.

80 And thereupon, upon the 8th day of March, 1899, the plaintiff herein, filed in the office of the clerk of said court his amended petition; said petition being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, MARTIN Herman, Plaintiff,
vs.
KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, Defendant } No. 3042.

Amended Petition.

Comes now the above-named plaintiff and for cause of action against the defendant alleges:

That at all times and dates hereinafter mentioned, said defendant was a railway company, duly incorporated, organized and existing

under and by virtue of the laws of Missouri, and during said times and dates, operated and controlled a line of railway upon the tracks and road-bed of the Union Terminal Railway Company, in the cities of Kansas City, Missouri and Kansas City, Kansas.

That said railway crosses the Kansas river upon a bridge at Ohio avenue in Kansas City, Kansas, and runs thence in a southerly direction along the west bank of said Kansas river in said last-mentioned city and crosses Central avenue therein, at grade.

That about three hundred feet northerly from Central avenue, a side track, equipped with a switch, leads out in a southerly direction from the main track; and nearer to central avenue than the said switch, a spur track leads out from said side track before mentioned in a southerly direction, extending to and across Central avenue and upon the property of the Metropolitan Street Railway Company, which said spur is also equipped with a switch located in Central avenue.

81 That on the 13th day of August, 1897, a switching crew composed of an engineer, fireman and three men, one of whom was foreman of said crew and conductor of said train, all in the employ and under the management and control of said defendant, were pushing, by means of a locomotive, a train of twenty-eight cars across said bridge along said railroad to a point southerly of Central avenue, along the main track of said road and in the said city of Kansas City, Kansas, at the rate of about fifteen miles per hour and in violation of ordinance No. 2536 of the city of Kansas City, Kansas; that said rate of speed was dangerous to the public and unnecessary and reckless.

That the brakes on said cars were not connected with the engine so as to be operated therefrom, as is usual and customary, and ordinarily done in moving such trains at such rate of speed; that the main-line switch was partially open, the handle bar standing out from the body of the switch stand and the target partially turned, all of which were in plain sight of the trainmen, and that the switch itself was out of repair, worn with age, use and previous accidents and since that time has been repaired and made safer.

That the rails on said main track were not notched to allow the points of the champered rails of the side track to fit securely and closely, and there were no curves in the rails of the main track to assist the trucks of the cars to keep the main track and to prevent them from riding over said switch.

That both said switches were left open and in a dangerous and unsafe condition, by employees and servants of said defendant, previous to the arrival of said train; the main-line switch having been left unlocked and the spur or Metropolitan switch left open so as to turn cars upon the Metropolitan spur.

82 That said main-line switch was provided with a lock which could be opened by striking the same with a coupling pin, link or any other heavy and convenient substance and said lock was not a reasonably safe, secure and suitable appliance for that purpose and that the switch on the Metropolitan spur track in Central avenue had no lock on it.

That previous to the 13th day of August, 1897, trains had been derailed at or near this point on said track.

That each and every one of the foregoing facts was well known or by the exercise of ordinary care and foresight could have been known to the defendant.

That the signal to stop said train was not given by the brakeman until the train had run on both tracks about four hundred feet after dividing at the main-line switch and when the signal to stop was given by the trainmen nearest the south end of the train it was necessary for the next man to run several car-lengths to communicate the signal to the man nearest the engine, which caused delay and the train was not stopped in time to avoid the injury hereinafter described.

That if a sufficient number of men had been on said train to instantly communicate stop signals, the injury would have been avoided; that if said train had been running at the lawful rate of six miles per hour it could have been stopped in time to avoid the injury and if the brakes on said cars had been connected with the engine, said train could have been stopped in time to avoid the injury hereinafter described.

That while running over said main-line switch, a portion of said train kept the main track and a portion passed on to the side track first above mentioned and from thence on to the spur track
83 leading to the Metropolitan power-house and collided with an empty coal car standing on said last-mentioned spur track at the corner of said power-house and upon the premises of said street railway company, thereby causing said empty coal car to strike Andrew Herman, the plaintiff, throwing him violently to the ground and on said track, and said cars passed over him, so bruising, crushing and mangling his right foot, ankle and leg that the same had to be and was amputated the same day.

That at the time said Andrew Herman was injured, he was crossing Central avenue and passing along a much-used and well-traveled pathway which had formerly been a public alley in said Kansas City, Kansas, but recently vacated, and at that time, occupied by the Metropolitan Street Railway Company.

That said pathway was ordinarily and commonly used by a large number of persons having occasion to go to and from their dwelling-houses and Central avenue, and many other persons having occasion to visit the dwelling-houses situated southerly from Central avenue and westerly from the tracks of said railway. All of which was well known to defendant.

That said Andrew Herman's injuries were caused solely and entirely by the negligence of the defendant in the following particulars:

1. In -ushing said cars at said time and place and under the circumstances at an unreasonable, dangerous and unnecessary rate of speed, to wit: fifteen miles per hour.

2. In pushing said cars at a rate of speed prohibited and forbidden by ordinance No. 2536 of Kansas City, Kansas.

3. In pushing said train of cars without sufficient men and in

proper places to communicate stop signals with reasonable promptness from the south end of the train to the locomotive in order to avoid injuries to others.

84 4. In pushing said train of cars at said time and place and under the circumstances, without having the brakes on said cars connected with the locomotive or having other suitable and sufficient means to control and stop said cars at the rate of speed at which they were being propelled, in time to prevent injuries to persons on and about said Central Avenue crossing and upon and about said pathway and Metropolitan Street Railway premises, and particularly to Andrew Herman.

5. In not observing that the first above-mentioned switch was not in proper and safe condition for the passing of trains when said train reached it and immediately stopping said train.

6. In leaving the switches above mentioned in such a position as to throw the cars from the main track to the side track and on to the said Metropolitan spur track, thereby causing said train to collide with said empty coal car.

7. In pushing said train of cars at such a rate of speed as to be beyond the control of the men in charge thereof, so that the said train could not be stopped, after the signal to stop was given, until, it had collided with said empty coal car and injured Andrew Herman.

8. In not communicating stop signals to the engineer with reasonable promptness after the train was derailed.

9. In not keeping said main-line switch in repair and securely fastened and locked when said train passed over the same.

10. In not notching and curving the rails of the main track to assist the trucks of the cars to keep the main track and to prevent them from riding the switch and being derailed.

11. In not providing said main-line switch with a safe, secure and suitable lock to prevent the same from being tampered with.

85 That said ordinance hereinbefore mentioned, was passed by the city council of the city of Kansas City, Kansas, on the 11th day of December, 1894, and was approved on the 12th day of December, 1894, was published in the official paper of said city on December 13th, 1894, and was at all times and dates hereinafter mentioned, in full force and effect in Kansas City, Kansas, and is entitled "An ordinance to regulate the running of locomotives and cars in the city of Kansas City, and repealing ordinance No. 522."

That in and by said ordinance it is provided by section two thereof, as follows:

SEC. 2. "It shall be unlawful for any such engineer, conductor, or other person having a railway engine or train of cars in charge, to permit the same to be run along any track in said city at a greater speed than six miles an hour."

That this defendant owed to this plaintiff the duty of operating this railroad with ordinary care, prudence and foresight for the safety and protection of plaintiff as one of the public using said pathway and crossing of said railroad at Central avenue in said city of Kansas City, Kansas, which said duty this defendant failed, neg-

lected and omitted to perform in the particulars above detailed. Which said failure, omissions and negligence were the direct causes of plaintiff's injuries.

That plaintiff was without fault or negligence in any manner contributing to his injuries.

That immediately prior to his said injuries, plaintiff was a strong, healthy, vigorous child for his age, four and one-half years; that by reason of said injuries, he is maimed and crippled for life.

That by reason of the loss of the said foot, his body will not grow and mature equally on boty sides, but the shoulder on the
86–89 crippled side will become higher than that on the other side and there will be a shrinking and impairment of the muscles on the injured side which will render plaintiff less able to earn a livelihood than if he received such injuries after his body was matured.

That by reason of all the foregoing, this plaintiff has suffered damages to the amount of $1999, for which sum with interest from the date of the filing of this petition herein, plain- prays judgment in his favor against defendant, besides costs.

SILAS PORTER,
WM. B. SUTTON,
Att'ys for Pl'ff.

Endorsed: In the court of common pleas, Wyandotte county, Kansas. No. 3042.—Andrew Herman, a minor, by his next friend, Martin Herman, *vs.* Kansas City Suburban Belt Railway Company.—Filed March 8th, 1899.—C. W. Litchfield, clerk.—Amended petition.

90 And thereupon, on the 16th day of May, 1899, the defendant, The Kansas City Suburban Belt Railroad Company filed in the office of the clerk of said court its answer to amended petition of plaintiff, a copy of said answer being in words and figures as follows:

In the Court of Common Pleas of Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, Plaintiff,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Defendant. } No. 3042.

Answer to Amended Petition.

Now comes the defendant, The Kansas City Suburban Belt Railroad Company and for its answer to the petition of the plaintiff in the above cause states:

First. It admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri having for its purpose the owning and operating of railroads.

Second. This defendant for further answer denies each and all of the allegations and averments made and contained in plaintiff's petition not hereinabove specifically admitted.

Third. For further answer this defendant states that ordinance No. 2536 mentioned on page 4 of plaintiff's amended petition, with the violation of which in the operation of its train this defendant was charged in said petition, is not now nor has been a legal and valid ordinance of the city of Kansas City, said ordinance having never been regularly and legally passed by the council of said city.

Said defendant further alleges that said ordinance is unreasonable as applying to the operation of such a train as is alleged in
91 the plaintiff's petition this defendant did operate at the time and place in question, said ordinance being in restraint of trade, and has no force and effect as applied to the train in question.

Fourth. For further defense, defendant states that if the plaintiff, Andrew Herman was injured as alleged in his said petition, that said injury was the result of the negligence of the plaintiff or Martin Herman and —— Herman his parents, directly contributing to said injury, and not through and on account of the negligence of this defendant.

Wherefore, having fully answered defendant prays that this action be dismissed and that it recover its costs herein incurred.

TRIMBLE & BRALEY,
Attorneys for Defendant.

Consent is hereby given to file this ans. out of time.
W. B. SUTTON, *For Pl'ff.*

Endorsed: No. 3042.—Andrew Herman a minor, by Martin Herman, his next friend, *vs.* Kansas City Suburban Belt Railroad Company. Answer to petition.—Filed May 16, 1899.—C W. Litchfield, clerk. By F. L. Kenny, deputy.

92 And thereupon, on the 16th day of May, 1899, the plaintiff herein, filed in the office of the clerk of said court his reply to answer of defendant, a copy of said reply being in words and figures as follows:

In the Court of Common Pleas od Wyandotte County, Kansas.

ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, Plaintiff,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Defendant.
} No. 3042.

Reply.

Now comes the above-named plaintiff and for reply to the answer of the defendant filed herein May 16th, 1899, states:

1st. Replying to the third answer and defense set out in said

answer plaintiff alleges that ordinance No. 2536, set out in his amended petition was regularly and legally passed by the council of the city of Kansas City, Kansas, and at the time of the injuries complained of in plaintiff's amended petition herein, was in full force and effect; that the same was reasonable and applied to the train w-ich injured this plaintiff and was not and is not in restraint of trade.

2nd. Plaintiff replying to the fourth answer and defense, denies each and every allegation in said fourth answer and defense contained.

Wherefore, plaintiff demands judgment as prayed for in his amended petition herein.

SILAS PORTER,
WM. B. SUTTON,
Attorneys for Plaintiff.

93–492 Endorsed: No. 3042.—In the court of common pleas of Wyandotte county, Kansas.—Andrew Herman *vs.* Kansas City Suburban Belt Railroad Company.—Reply.—Filed May 16th, 1899.—C. W. Litchfield, clerk. By F. L. Kenny, deputy.

493–500 TUESDAY, *June 27th*, 1899.

And now the jury notify the court that they have agreed upon a verdict and are brought into open court and the jury, being all present, by and through their foreman, return the following verdict, to wit:

"We, the jury, find the issues joined herein in favor of the plaintiff and against the defendant and assess his damages at the sum of $1500.

G. H. WEBSTER, *Foreman.*"

* * * * * * *

501–540 It is therefore, considered, ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant, the full sum of $1500 with interest thereon, at the rate of 6 % per annum, from June 27, 1899, and costs herein, taxed $——.

Wherefore, let execution issue.

541 *Journal Entry of Judgment.*

THE KANSAS CITY SUBURBAN BELT RAILROAD CO., Plaintiff in Error,
vs.
ANDREW HERMAN, a Minor, etc., *et al.*, Defendants in Error. } No. 12037.

This cause comes on for decision; and thereupon, it is ordered and adjudged that the judgment of the court of appeals and the judgment of the court of common pleas be affirmed. It is further

ordered that plaintiff in error pay the costs of this case in this court taxed at $—— and hereof let execution issue.

542 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a syllabus and opinion in this cause, which syllabus and opinion are in the words and figures as follows to wit:—

543 No. 12037.

Division one—February, 1902.

Doster, C. J.; Johnston, Ellis, and Pollock, JJ.

THE KANSAS CITY SUBURBAN BELT RAILroad Company
v.
ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, and The Union Terminal Railway Company.

Error from Court of Appeals, Northern Department, Western Division. Affirmed.

Syllabus by the court—Ellis, J.

Where, on the trial of an action, the jury was instructed that a railway company is guilty of negligence when it runs a train within the limits of a city of the first class faster than is permitted by ordinance, still where the jury is advised that such violation of law does not of itself render the railway company liable to one who has sustained injuries, but that in order for the jury to so find it must appear by a preponderance of the evidence that such injuries "were the direct and proximate result of the rate of speed at which the train was traveling," the instructions, construed together, are not erroneous.

544 The opinion of the court was delivered by ELLIS, *J.:*

This action was originally brought against The Kansas City Suburban Belt Railway Company, a Missouri corporation, and The Union Terminal Railway Company, a Kansas corporation, by Andrew Herman, a minor by his next friend, to recover $10,000 damages for an injury to the plaintiff, a child four years of age, by reason of the alleged negligence of the defendants. On the day the summons was returnable the defendant, Belt Company, filed its petition and bond for a removal of the cause to the United States circuit court, on the ground of diversity of citizenship between the plaintiff and that company, and because the controversy between the plaintiff and said company was separable from the controversy between the plaintiff and the Union Terminal Company. The court denied the application for removal. Thereafter the cause was tried at the September, 1898 term of the court of common pleas. At the close of plaintiff's testimony the Union Terminal Railway Company interposed a demurrer to the evidence, which the court

sustained. The Belt Company thereupon, and before any other proceedings were had in the case, filed another petition and bond for removal to the United States circuit court on the ground of diversity of citizenship between the plaintiff and defendant, alleging the filing of the former petition for removal and the fact that the demurrer of the Union Terminal Railway Company had been sustained, and further alleging that not only was no evidence offered or attempted to be offered by plaintiff to show a cause of action against the Union Terminal Company, but that the latter company had been joined with the Belt Company for the sole purpose of preventing a removal of the cause to the United States court, and that no proper attempt was made to show any cause of action against it. Plaintiff filed what his counsel called an answer to the petition for removal, alleging good faith in joining the two railways as defendants, and setting forth in substance that the counsel for the respective railway companies had promised to produce certain documents and papers in court which counsel for plaintiff below contended would have shown liability on the part of both of said railway companies towards his client, but that after relying upon the good faith of counsel to produce
545 such papers and records, at the last moment, and during the trial, counsel had violated such promise and refused to produce them, for which reason it was claimed the plaintiff had been deprived of material evidence. This so-called answer was properly verified by counsel for plaintiff below, and thereupon the court again denied the right of removal to the Belt Railway Company, to which the latter excepted. The trial proceeded and resulted in a disagreement of the jury. At the ensuing February term of court, the plaintiff, on leave granted, filed an amended petition against the Belt Company, reducing the amount of damages claimed to $1999, upon which issues were joined, and the cause tried during the May term following.

The jurisdiction of this court to hear and determine the case is challenged upon the ground that the second application for removal to the United States circuit court ought to have been granted for which reason the case must be here treated as though it had in fact been removed to the Federal court. In support of this contention the case of Powers *v.* Railway Company, 169 U. S. 92, is cited as authority. The following is quoted from the opinion:

"In the case at bar, the second petition for removal, as presented to the State court, alleged that the petitioner was a citizen of the States of Virginia and West Virginia; that the plaintiff was a citizen of Kentucky; that Evans and Hickey had been fraudulently and improperly joined as defendants, for the purpose of defeating the petitioner's right of removal; that, because of their joinder, the cause had been remanded to the State court, and that the action, having been discontinued against them, was now, for the first time, binding against the petitioner alone * * * It was thus made to appear upon the record of the State court that the case could not have been removed before, and that it had now become in its nature removable, by reason of the diverse citizenship of the parties. Such

being the case, it was rightly removed by the second petition for removal, into the circuit court of the United States."

It will be observed that in that case the plaintiff voluntarily dismissed his action against those defendants whose relationship to the action afforded the only impediment to a removal of the cause into the United States court.

In the later case of Whitcomb *v.* Smithson, 175 U. S. 635, suit was brought against two railroad companies to recover for personal injuries sustained by an employé of one of them, and after the evidence had all been taken at the trial, the court sustained a motion to instruct the jury to return a verdict on behalf of one of
546 the railroad companies, because the evidence did not sustain the allegations of the complaint as to the negligence of that defendant, and thereupon the remaining defendant, alleging diverse citizenship, immediately filed a petition and bond for removal of the cause to the United States court, which was denied. Referring to the motion to instruct the jury, the court, speaking through Mr. Chief Justice Fuller, said:

"This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them."

We regard that decision as decisive of this case. It having been made to appear *prima facie* that the railway companies originally made party defendants were not joined for the fraudulent purpose of preventing a removal, the sustaining of the demurrer to the evidence as to the Kansas corporation, without the consent of plaintiff below and against his desire and interest, did not render the cause removable.

The Belt Company does a mere switching and transfer business for the different roads entering Kansas City. It runs no trains of its own, but merely handles and transfers cars for other railroads which it intersects in and about the city. The accident happened a few feet south of Central avenue near the west bank of the Kansas river, in Kansas City, Kansas. Central avenue runs east and west, and upon the line of that street a bridge spans the river, which, at that point, flows in a northerly direction, and the railway runs nearly parallel with the river. About two hundred and twenty-five feet north of the north line of Central avenue a switch-track leads west out of the main track of the railway, and extends southward across Central avenue, and parallel with the main track. Some distance south of the avenue is a private switch-track owned by the Metropolitan Street Railway Company, which connects with the switch-track just mentioned, and lies west of it. On the day of the accident this Metropolitan switch-track was open so that cars coming south down the main switch, or switch occupied by the Belt Company, could pass, without obstruction, onto the Metropolitan track. Upon the latter track stood a coal car. The plaintiff and another boy about his age had passed from Central avenue southward, and were following a beaten path used

for travel along the Metropolitan track when a train of
547 twenty-seven cars backed rapidly from the north, and when the rear end of the train arrived at the switch north of Central avenue the first, or rear car, remained on the main line, the second was derailed, and most of the others turned in upon the switch-track of the railway company and ran, with considerable velocity, toward the open Metropolitan switch. An employé in the power-house of the Metropolitan Company, seeing the boys and realizing their danger, shouted at them, and plaintiff's companion ran to a place of safety while plaintiff, who was probably out of danger when given the warning, ran upon the Metropolitan track south of the coal car, which being struck by the train, started violently forward and ran over him cutting off his foot. The allegations of negligence contained in the petition which were finally submitted by the court to the jury, as contended for on the part of the plaintiff, were five in number and are as follows:

"1. That said train of cars was traveling faster than six miles per hour, in violation of ordinance 2536 of the city of Kansas City, Kansas.

"2. That there were not enough men, in proper places, on said train, to communicate stop signals with reasonable promptness to the engineer who was in charge of the locomotive of said train.

"3. That, under the circumstances of this case, and the rate of speed at which the said train of cars was traveling, the brakes on the cars of said train should have been connected with the locomotive.

"4. That the trainmen who were operating said train did not observe that the switch connecting the side track with the main track, was not in a safe and proper condition for the passing of trains over it, when they reached said switch with said train, and not immediately stopping said train.

"5. That the main-line switch was not kept securely locked and fastened."

Of these the second was waived by counsel for plaintiff below upon the argument. The instructions given upon these several claims of negligence were in substantial conformity with rules hitherto approved by this court, and appear to us to be free from material error, although objections are urged against each of them. As such instructions were very lengthy, and as no useful purpose could be subserved thereby they are not set forth herein.

Plaintiff in error strenuously objects to the instructions which relate to a violation of the ordinance of the city of Kansas City, Kansas, above referred to. While the jury were advised that the violation of such ordinance by the railway company consti-
548 tuted negligence, they were in effect informed that such violation of law did not of itself render the company liable, but that in order for the jury to so find it must appear by a preponderance of the evidence that the injuries to plaintiff "were the direct and proximate result of the rate of speed at which the train was traveling." Therefore, the contention of plaintiff in error that under the instruction the jury were authorized to infer that the

company was liable from the mere fact that its train was running faster than the ordinance permitted, is without force.

Counsel for plaintiff in error, on the trial, sought to prove that the ordinance was unreasonable in that near the place of the accident a grade existed in the track, and that in order to transport a heavy train up such grade it was necessary to run at a greater velocity than six miles an hour to secure the necessary momentum to go over the grade. To that end it offered to show the number of cars usually placed in a train, and the rate of speed at which such train ordinarily ran at that point. The offer of evidence was refused by the trial court. Upon such ruling no error can be predicated. By statute the city was invested with the power to regulate the speed of trains within its limits. (Chapter 18, art. 13, paragraph 21, Gen. Stat. 1901.) The rate of six miles per hour prescribed by the ordinance objected to is not unreasonable, and while a compliance with it may require a reduction in the number of cars which might be carried upon a level in order that a given train may ascend a grade, such ordinance is not, for that reason, obnoxious to criticism.

The other assignments of error are included within those adverted to above so far as they seem to deserve attention. The record tends to show that the railway company had a fair trial; the damages awarded are not claimed to have been excessive, and the special findings of the jury sustain the judgment, which is affirmed.

(Endorsed:) No. 12,037. The Kansas City Suburban Belt Railway Company, *v.* Andrew Herman, a minor etc. *et al.* Syllabus and opinion. A. Filed Mar. 8 1902. D. A. Valentine, clerk supreme court.

549 And afterward, on the 21st day of March A. D. 1902, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition for a writ of error, which, with the endorsements thereon and the allowance thereof, is in words and figures as follows, to wit:—

550 In the Supreme Court of United States, October Term, 1901.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, Plaintiff in Error,
vs.
ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, and The Union Terminal Railway Company, Defendants in Error.

To the honorable chief justice of the supreme court of the State of Kansas:

The petition of The Kansas City Suburban Belt Railway Company respectfully shows that on the tenth day of March, A. D., 1902, the supreme court of the State of Kansas rendered a judgment against your petitioner by affirming the judgment of the lower court

in a certain cause wherein Andrew Herman, a minor, by his next friend Martin Herman, was plaintiff, and your petitioner, together with The Union Terminal Railway Company, were defendants, for the sum of fifteen hundred dollars and costs, and awarded execution thereon, as will appear by reference to the record and proceedings in said cause; that said court is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statutes of the United States authorizing writs of error to State courts, especially section 709 of the Revised Statutes, because your petitioner was denied the right of removal of the said cause to the circuit court of the United States for the District of Kansas under the following circumstances: The action was originally brought against The Kansas City Suburban Belt Railway Company, a Missouri corporation, and The Union Terminal Railway Company, a Kansas corporation, by Andrew Herman, a minor by his next friend, both residents of the State of Kansas, in
551 the court of common pleas of Wyandotte county, Kansas, to recover $10,000 for injury to the plaintiff by reason of the alleged negligence of the defendants. On the day the summons was returnable your petitioner filed its petition and bond for removal of the cause to the United States circuit court on the ground of diversity of citizenship between the plaintiff and that company, and because the controversy between the plaintiff and said company was separable from the controversy between the plaintiff and the Union Terminal Railway Company. The court denied the application for removal. Thereafter, the cause was tried at the September 1898 term of the said court of common pleas. At the close of plaintiff's testimony, it appeared that the plaintiff had not introduced or attempted to introduce any testimony as against the Union Terminal Railway Company, and it interposed a demurrer to the evidence, which the court sustained.

Your petitioner thereupon, and before any other proceedings were had in the case, filed another petition and bond for removal to the United States circuit court for the district of Kansas on the ground of diversity of citizenship between the plaintiff and your petitioner, alleging the filing of the former petition for removal and the fact that the demurrer of the Union Terminal Railway Company had been sustained and further alleging that not only was no evidence offered or attempted to be offered by plaintiff to show a cause of action against the Union Terminal Railway Company, but that the latter company had been joined with the Belt Company for the sole purpose of preventing a removal of the cause to the United States court, and that no proper attempt was made to show any cause of action against it. The court denied your petitioner's application for a removal to the United States circuit court for the district of Kansas, and it duly excepted. The trial proceeded and resulted in a disagreement of the jury. At the ensuing February term of court, the plaintiff, on leave granted, filed an amended petition against your petitioner alone, reducing the amount of damages claimed to

$1999.00, upon which issues were joined and the cause tried
552 during the May term following, resulting in a verdict for the plaintiff in the sum of $1500.00. Your petitioner prosecuted its appeal to the Kansas court of appeals, which affirmed the action of the lower court in denying your petitioner's right of removal and prosecuted an appeal therefrom to the supreme court of Kansas, which affirmed the judgment of the lower court and in doing so held and decided that the action of the lower court and of the Kansas court of appeals in deciding against your petitioner's right of removal to the United States court, was proper, and affirming its action in that regard, all of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation and supersedeas; and it will ever pray etc.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, *Petitioner*,
By LATHROP, MORROW, FOX & MOORE,
Attorneys for Petitioner.

Allowed this March 21st 1902.

FRANK DOSTER,
Chief Justice.

552½ [Endorsed:] 12037 K. C. Sub. Belt R'd Co. *vs.* Andrew Herman etc. Petition for writ of error. Filed Mar. 21 1902 D. A. Valentine, clerk supreme court. Lathrop, Morrow, Fox & Moore, attorneys-at-law, Kansas City, Missouri.

553 And on the same day to wit the 21st day of March 1902, there was filed in the office of the clerk of the supreme court of the State of Kansas an assignment of errors, which assignment of errors with the endorsements thereon, is in words and figures as follows, to wit:

554 In the Supreme Court of United States, October Term, 1901.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, Plaintiff in Error,
vs.
ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, and The Union Terminal Railway Company, Defendants in Error.

Assignment of Errors.

Comes now The Kansas City Suburban Belt Railway Company, plaintiff in error, by its counsel, and respectfully represents that it feels itself to be aggrieved by the proceedings and judgment of the supreme court of the State of Kansas in the above-entitled cause, and assign- error thereto as follows:

First. This action was originally brought in the court of common pleas of Wyandotte county, Kansas, by Andrew Herman, a minor by his next friend Martin Herman, both citizens of the State of Kansas, against The Kansas City Suburban Belt Railway Company, a corporation of the State of Missouri, and The Union Terminal Railway Company, a corporation of the State of Kansas, to recover the sum of ten thousand dollars damages for an injury to the plaintiff by reason of the alleged negligence of the defendants. On the day the summons was returnable the defendant Kansas City Suburban Belt Railway Company filed its petition and bond for a removal of the cause to the United States circuit court for the district of Kansas, on the ground of diversity of citizenship between the plaintiff and that company, and because the controversy between the plaintiff and said company was separable from the controversy between the plaintiff and The Union Terminal Railway Company. The court denied the application for removal. Thereafter the cause was tried at the September 1898 term of the court of common pleas. Plaintiff offered no testimony at all tending to prove any liability upon the part of the Union Terminal Railway Company and
555 no effort was made to charge that company. At the close of plaintiff's testimony the Union Terminal Railway Company interposed a demurrer to the evidence, which the court sustained. The Belt Company thereupon and before any proceedings were had in the case, filed another petition and bond for removal to the United States circuit court, on the ground of diversity of citizenship between plaintiff and the defendant Kansas City Suburban Belt Railway Company, alleging the filing of the former petition for removal and the fact that the demurrer of the Union Terminal Railway Company had been sustained, and further alleging that not only was no evidence offered or attempted to be offered by plaintiff to show a cause of action against the Union Terminal Railway Company, but that the latter company had been joined with the Belt Company for the sole purpose of preventing a removal of the cause to the United States circuit court for the district of Kansas, and that no proper attempt was made to show any cause of action against it. The court denied the application of the Kansas City Suburban Belt Railway Company for a removal under the foregoing circumstances; to which action that company saved its exception. The case was tried, resulting in a verdict for plaintiff, which was affirmed by the Kansas court of appeals and by the supreme court of Kansas. The court of common pleas of Wyandotte county, Kansas, erred in denying the said application for a removal and the Kansas court of appeals and the supreme court of the State of Kansas erred in affirming such judgment and in holding that the right of removal under the foregoing circumstances did not exist.

Wherefore, the said Kansas City Suburban Belt Railway Company, plaintiff in error, prays the honorable court to examine and correct the errors assigned and for a reversal of the judgment of the supreme court of the State of Kansas entered in the above-entitled cause, with directions that the court of common pleas of Wyandotte

county be directed and required to grant the said petition for removal by this plaintiff in error.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY,
By LATHROP, MORROW, FOX & MOORE,
Its Solicitors.

555½ [Endorsed:] 12037. Kansas City Suburban Belt R'l'd Co. *vs.* Andrew Herman minor etc. Assignments of error Filed Mar. 21 1902 D. A. Valentine clerk supreme court. Lathrop, Morrow, Fox & Moore, attorneys-at-law, Kansas City, Missouri.

556 And also on the 21st day of March 1902, there was filed in the office of the clerk of the supreme court of the State of Kansas, a writ of error, which writ of error with the endorsements thereon is in words and figures as follows, to wit:

557 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Kansas before you or some of you, being the highest court of law or equity of the said State, in which a decision could be had in said suit, between Andrew Herman, a minor by his next friend Martin Herman, against The Kansas City Suburban Belt Railway Company and The Union Terminal Railway Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of the statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Kansas City Suburban Belt Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that

558 the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to

correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of March, the year of our Lord, one thousand nine hundred and two.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of United States Circuit Court for the District of Kansas, Eighth Circuit.

Allowed to operate as a supersedeas by Frank Doster chief justice of the supreme court of the State of Kansas.

FRANK DOSTER,
Chief Justice.

558½–563 [Endorsed:] 12037. The Kansas City Suburban Belt R'l'd Co. *vs.* Andrew Herman, a minor, etc. Writ of error. Filed Mar. 21, 1902. D. A. Valentine, clerk supreme court. Lathrop, Morrow, Fox & Moore, attorneys-at-law, Kansas City, Missouri.

564 UNITED STATES OF AMERICA, *ss:*

To Andrew Herman, a minor, by next friend, Martin Herman, and The Union Terminal Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein The Kansas City Suburban Belt Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable chief justice of the supreme court of the State of Kansas this 21st day of March, in the year of our Lord, one thousand nine hundred and two.

FRANK DOSTER,
Chief Justice of Supreme Court of State of Kansas.

COUNTY OF WYANDOTTE, *State of Kansas,* } *ss:*

We hereby acknowledge due and timely service of the within citation.

SILAS PORTER,
Solicitors for Andrew Herman, a Minor, by His Next Friend, Martin Herman, and
JNO. A. EATON,
Solicitors for the Union Terminal Railway Company.

564½ & 565 [Endorsed:] 12037. The K. C. Suburban Belt R'l'd Co. *vs.* Herman etc. Citation. Filed Mar. 28 1902 D. A. Valentine, clerk supreme court. Lathrop, Morrow, Fox & Moore, attorneys-at-law, Kansas City, Missouri.

566 In the Supreme Court of the State of Kansas.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, Plaintiff in Error,
vs.
ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, and The Union Terminal Railway Company, Defendants in Error. } No. 12037.

Pursuant to a writ of error issued out of the United States circuit court for the district of Kansas, on the 22nd day of March A. D. 1902 and directed to the supreme court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record, and proceedings of this court, in the within-entitled case, with all things concerning the same.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 16th day of April A. D. 1902.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

567 In the Supreme Court of the United States.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Plaintiff in Error,
vs.
ANDREW HERMAN, a Minor, by His Next Friend, MARTIN HERMAN, and The Union Terminal Railway Company, Defendants in Error.

In accordance with rule 9, the plaintiff in error files with the clerk the following statement:

1. The error on which the plaintiff in error intends to rely is the refusal of the court of common pleas of Wyandotte county, Kansas, to grant the petition for a removal to the circuit court of the United States for the district of Kansas, filed by the plaintiff in error.

The parts of the record which the plaintiff in error thinks necessary for the consideration of the questions presented in the record are as follows:

Original petition, with recital showing date of filing, pages 2, 3, 4, 5, 6 and 7 of case-made.

Petition of plaintiff in error for removal of cause to United States circuit court, with recital of date of filing, pages 19, 20 and 21 of case-made.

Bond of removal of plaintiff in error, with recital of filing, page 25 of case-made.

Journal entry, with recital of filing, page 26*a* of case-made.

Journal entries of first trial, with dates, pages 53*a*, 53*b*, 53*c* and 53*d* of case-made.

Motion to dismiss, with recital of filing, page 54 of case-made.

Journal entry showing demurrer to evidence, with recital of filing, page 55 of case-made. Also demurrer to evidence of plaintiff in error, with ruling upon both demurrers, page 56 of case-made.

568 Petition for removal, with recital of filing, pages 57, 58 and 59 of case-made.

Bond for removal, pages 60, 61 of case-made.

Order denying removal, pages 64 and 65 of case-made.

Amended petition, pages 66, 67, 68, 69, 70, 71 of case-made.

Journal entry, with date, page 79 of case-made.

Amended petition, with recital of filing, pages 80, 81, 82, 83, 84, 85 and 86 of case-made.

The answer of plaintiff in error, with recital of filing, page 90 case-made.

Verdict of jury, the date and recital of rendition, page 493 of case-made.

Judgment, page 501 of case-made.

Record entry of judgment in supreme court of Kansas, page 541 of transcript.

Syllabus and opinion, supreme court of Kansas, pages 543, 544, 545, 546, 547 and 548 of transcript.

Petition for writ of error, with recital of filing, pages 549, 550, 551, 552 of transcript.

Assignment of errors and recital of filing, pages 553, 554, 555 of transcript.

Writ of error and allowance, with recital of filing, pages 556, 557, 558, of transcript.

Citation with acknowledgment of service and recital of filing, pages 563 and 564 of transcript.

Return of clerk of supreme court of Kansas to writ of error, page 566 of transcript.

S. W. MOORE,
Att'y for Plaintiff in Error.

Copy received.
JOHN A. EATON,
Attorney for Defendant in Error.
SILAS PORTER,
Att'y for Defendant in Error.

569 [Endorsed:] File No. 18,523. Supreme Court U. S., October term, 1901. Term No. 670. The Kansas City Suburban Relt R. R. Co., pl'ff in error, *vs.* Andrew Herman, a minor, by his next friend Martin Herman, *et al.* Statement by plaintiff in error of errors relied on & designation of parts of record to be printed & proof of service of same. Filed May 8th, 1902.

570 In the Supreme Court of the United States.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Plaintiff in Error,
vs.
ANDREW HERMAN, a Minor, by His Next Friend, MARTIN HERMAN, and The Union Terminal Railway Company, Defendant- in Error.

In accordance with rule 9, the defendant in error files with the clerk the following statement of additional parts of the record which he thinks necessary to be printed in the record:

Answer of the defendant in error to the petition for removal of cause, with recital showing date of filing, pages 62, 63 and 64, of case-made.

Motion to make petition more definite and certain, with recital of filing, pages 75 and 76 of case-made.

Journal entry sustaining said motion, page 77 of case-made.

Page 91 of case-made, being the conclusion of answer to petition.

Reply of defendant in error, with recital of filing, pages 92 and 93 of case-made.

SILAS PORTER,
Counsel for Defendant in Error, Andrew Herman.

We acknowledge service of a copy of the above and foregoing suggestion of additional parts of record to be printed, this 24th day of April, 1902.

LATHROP, MORROW, FOX & MOORE,
Counsel for Plaintiff in Error.

571 [Endorsed:] File No. 18,523. Supreme Court U. S. October term, 1901. Term No. 670. The Kansas City Suburban Belt R'y Co., P. E., *vs.* Andrew Herman, a minor, by his next friend Martin Herman, *et al.* Designation by counsel for defendant in error of parts of record to be printed, & proof of service of same. Filed May 3d, 1902.

Endorsed on cover: File No. 18,523. Kansas. Supreme court. Term No. 321. The Kansas City Suburban Belt Railway Company, plaintiff in error, *vs.* Andrew Herman a minor by his next friend Martin Herman, and The Union Terminal Railway Company. Filed May 2d, 1902.

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—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, *Plaintiff in Error*,

vs.

ANDREW HERMAN, A MINOR, BY HIS NEXT FRIEND, MARTIN HERMAN, AND THE UNION TERMINAL RAILWAY COMPANY, *Defendants in Error.*

No. 321.

Brief of Plaintiff in Error in Opposition to the Motion of Defendant in Error to Dismiss or Affirm.

STATEMENT.

Andrew Herman, a minor, by his next friend, Martin Herman, both residents of the State of Kansas, brought this action in the Court of Common Pleas of Wyandotte county, Kansas, on September 18, 1897, against The Union Terminal Railway Company, a Kansas corporation,

and The Kansas City Suburban Belt Railway Company, a Missouri corporation, to recover ten thousand dollars for personal injuries.

The petition charged that The Union Terminal Railway Company "owned and operated" the railway in question; that the Kansas City Suburban Belt Railway Company "operated its trains upon and controlled the railway of the defendant The Union Terminal Railway Company;" and that a train operated by The Kansas City Suburban Belt Railway Company was negligently managed, resulting in the injury of the plaintiff (Rec., 1-3).

The Suburban Belt Railway Company, upon the answer day, filed its petition and bond for removal upon the ground of a separable controversy (Rec., 4). The State Court denied the petition for removal (Rec., 7), and the case went to trial.

The plaintiff offered no evidence at all tending to prove a cause of action against the defendant Union Terminal Railway Company, and the court, at the close of plaintiff's evidence, sustained the demurrer filed by that company, and at once rendered final judgment against the plaintiff and in favor of The Union Terminal Railway Company (Rec., 10–17).

The Kansas City Suburban Belt Railway Company immediately upon the sustaining of the demurrer and the rendition of final judgment, and before any further proceedings were had, filed its petition and bond for removal. The petition for removal was verified and con-

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tained the usual averments of diversity of citizenship, amount in controversy and a recital of the prior proceedings (Rec., 12). It also contained the following direct averment: "And the defendant further says that no evidence was offered or introduced by plaintiff or attempt made to show a cause of action against The Union Terminal Railway Company; that said Union Terminal Railway Company was joined with this defendant fraudulently and for the sole purpose of preventing a removal of this cause to the Circuit Court of the United States, with no purpose or intent of attempting to show any cause of action against it" (Rec., 13).

Plaintiff's counsel thereupon filed his affidavit, stating that the suit was brought in good faith against both defendants and giving as a reason why no evidence was offered against The Union Terminal Railway Company that he was disappointed in obtaining the attendance of some witness whose testimony "if introduced would have tended to prove the joint liability of said defendants;" and also stating some misunderstanding between counsel as to the production of documents (Rec., 15-16).

The court again overruled the application to remove, and the case proceeded against The Kansas City Suburban Belt Railway Company alone, and resulted in a disagreement of the jury (Rec., 16).

Afterwards the plaintiff filed his amended petition against The Kansas City Suburban Belt Railway Company alone, reducing the *ad*

damnum to $1,999 (Rec., 17), and a trial was had, resulting in a verdict for plaintiff in the sum of $1,500 (Rec., 28). An appeal was taken to the Kansas Court of Appeals, and thence to the Supreme Court of Kansas, which affirmed the judgment of the lower court; thereupon this writ of error was sued out to review the action of the state court in denying the application for removal filed after the court had sustained the demurrer of The Union Terminal Railway Company and rendered judgment in its favor and before any further proceedings were had.

BRIEF AND ARGUMENT.

I.

The court has jurisdiction to determine the question raised in this record.

The question presented by this record is whether the railway company was entitled to remove this suit from a state to the Federal court after plaintiff had rested his case, having failed to offer any evidence whatever against the resident defendant The Union Terminal Railway Company, and after the court had sustained the demurrer of that company and rendered final judgment in its favor and against the plaintiff. The state court refused the removal. Under these circumstances, this court has jurisdiction to determine whether there was error on the part of the state court in retaining the case.

Missouri, Kansas & Texas Ry. Co. v. *Hickman*, 22 Sup. Ct. Rep., 18;
Removal Cases, 100 U. S., 457;
Stone v. *South Carolina*, 117 U. S., 430;
Missouri Pacific Ry. Co. v. *Fitzgerald*, 160 U. S., 556.

II.

The failure of the plaintiff below to offer any testimony against The Union Terminal Railway Company was an abandonment of its case against that company and equivalent to a dismissal. The case thereupon became removable and the state court erred in refusing to grant the application made therefor.

An application to remove may be made when the case first becomes removable, even though

made during the trial; if the plaintiff increases the *ad damnum* so as to bring the case within the jurisdiction of the Federal court; or if the plaintiff voluntarily dismisses the action as to the resident defendant, leaving a controversy between citizens of different states.

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S., 92;

Northern Pacific Ry. Co. v. *Austin*, 135 U. S., 315.

In the former case the Court said:

> The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.
>
> The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time.

If the plaintiff had voluntarily dismissed his action as to The Union Terminal Railway Company, then it must be conceded, in view of the rule established in the Powers case, that

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the cause would thereupon have become removable; and an application made for that purpose would have been timely, and it would have been error on the part of the state court to refuse it.

Instead of voluntarily dismissing his action as to that company, the plaintiff omitted to offer any evidence tending to prove a cause of action against it, and the court promptly sustained the demurrer and rendered final judgment in its favor. Is that not equivalent to a dismissal, so far as the right of removal is concerned?

It is submitted that such voluntary *abandonment* by plaintiff of his claim against the resident defendant is the same in legal effect as a voluntary *dismissal*. Is there any distinction to be drawn between a voluntary dismissal by the plaintiff and a demurrer sustained by the court because plaintiff *voluntarily abandons his claim* and purposely fails to introduce any evidence? Is not the failure to introduce any evidence a *confession* that the case ought to be dismissed.

Let us assume that a resident of Kansas desires to sue a non-resident corporation in the local courts of that state, and for some reason is anxious to avoid a removal to the Federal court. He joins with the non-resident corporation any one of the million and a half residents of Kansas, alleges a joint liability and proceeds to trial. He is careful not to dismiss as to the resident defendant, because he knows that to do so would render the cause at once removable. He,

therefore, introduces his proof against the non-resident defendant, but is unable, as he well knows, to offer any evidence against the resident defendant. The court, at the close of plaintiff's evidence, promptly sustains the demurrer of the resident defendant and renders final judgment in his favor. The case then proceeds to judgment against the non-resident defendant. Does this court hold that the right of removal may be defeated in this way? If so, then the right of removal is judicially expunged from the statute book. It was said by Mr. Justice Miller, in *Arapahoe Co.* v. *Railway Company,* 4 Dill., 277, in speaking of the right of removal, that the court should "be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

It is said by plaintiff's counsel in his affidavit that he expected to introduce evidence against the Union Terminal Railway Company, but was prevented by the absence of a witness and by a misunderstanding with opposing counsel. But no request was made for a continuance, and no effort made to supply the alleged missing evidence. By proceding under these circumstances, the plaintiff *abandoned* his case against the Union Terminal Railway Company and confessed its non-liability by offering no testimony against it. The plaintiff ought then to have dismissed his action as to that company. Had he done so, the cause would, of course, have been removable. Is the plaintiff, therefore, to profit by failing to do that which he should have done?

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III.

The case of Whitcomb v. Smithson is not conclusive of the case at bar.

Defendant in error relies most strongly upon the case of *Whitcomb* v. *Smithson,* 175 U. S., 635. In that case, as stated by the court, "the joint liability was insisted on here *to the close of the trial,* and the non-liability of the railway company was ruled *in invitum.*" The case there did not stop as to the railway company upon the close of the plaintiff's testimony. The case proceeded to a verdict, and the jury, under the instructions of the court, returned a verdict in favor of the railway company. The case as to all defendants was finally submitted to the jury. There was, as stated by the court, "a ruling on the merits."

In the Whitcomb case, there were two features which distinguish it from the case at bar: (a) *The case proceeded to verdict and judgment as against all of the defendants.* The railway company was not *eliminated* from the case at the close of the plaintiff's testimony, as in the case at bar. (b) The ruling of the court in the Whitcomb case was on the *merits*; from which we may infer that there was a *bona fide* effort made to introduce testimony against the railway company, which failed only because the court as a matter of law deemed the proof insufficient to warrant a judgment, whereas in the case at bar there was no attempt whatever to offer any testimony of any kind against the Union Terminal Railway Company.

IV.

Under the Kansas Statute, when the demurrer was sustained and judgment rendered, the Union Terminal Railway Company ceased to be a party to the action and the case became removable.

In this connection it is important to note the provisions of the statutes of Kansas referring to judgments.

Sec. 389 General Statutes of Kansas of 1897, is as follows: "A judgment is the final determination of the rights of the parties in an action."

Sec. 391 is as follows: "In an action against several defendants, the court may in its discretion render judgment against one or more of them, *leaving the action to proceed against the others* whenever a several judgment may be proper."

It is thus seen that the action of the state court in sustaining a demurrer and rendering final judgment at the close of plaintiff's evidence had the effect to eliminate the Union Terminal Railway from the case. It was no longer a *party* to the cause. The plaintiff concedes this view to be correct, since in filing its amended petition thereafter, the Kansas City Suburban Belt Railway Company was the sole defendant.

The case, as it then stood, was between the plaintiff, a resident of Kansas, and the Kansas City Suburban Belt Railway Company, a resident of Missouri, and the amount involved exceeded, exclusive of interest and costs, the

sum or value of two thousand dollars. We submit that the case at that moment became removable for the first time, and that the application for removal should have been granted, and that the state court committed error in refusing it.

We most earnestly submit that the writ of error sued out herein was not taken for delay, and that the question raised by the record is not so frivolous as to need no further argument. We think a most serious question is raised, and that it is of sufficient moment to justify an oral argument and the careful consideration of the court.

V.

It is not important that the plaintiff afterwards reduced his demand to an amount below the jurisdiction of the Federal court, or that the state court retained the case and proceeded to trial, and that the plaintiff in error participated therein. These events occurring after the application for removal, do not affect the question of jurisdiction.

Powers v. *Ry. Co.*, 169 U. S., 102;
Black's Dillon on Removal of Causes, Sec. 192, and cases cited.

VI.

It is also submitted that as, under the practice of this court, the motion can not be passed upon without referring to the transcript, it

should be denied without prejudice, or continued until this cause is heard in its regular assignment.

Callan v. *Bransford*, 139 U. S., 197.

Respectfully submitted,

GARDINER LATHROP,
THOMAS R. MORROW,
JOHN M. FOX,
SAMUEL W. MOORE,
Attorneys for Plaintiff in Error.

No. 321.

Office Supreme Court U.S.
FILED
SEP 22 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Porter for D.E.

Filed Sept. 22, 1902.

IN THE

Supreme Court of the United States.

October Term, 1902

NO. 321.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

ANDREW HERMAN, a minor, by his next friend, Martin Herman, and the UNION TERMINAL RAILWAY COMPANY,

DEFENDANTS IN ERROR.

W. B. SUTTON,
SILAS PORTER,
Counsel for said Defendant in Error.

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IN THE

Supreme Court of the United States.

October Term, 1902

NO. 321.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

ANDREW HERMAN, a minor, by his next friend, Martin Herman, and the UNION TERMINAL RAILWAY COMPANY,

DEFENDANTS IN ERROR.

Notice of Motion.

To Messrs. LATHROP, MORROW, FOX and MOORE,
Counsel for Plaintiff in Error.

Please take notice that on Monday, the 20th

day of October, 1902, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the said court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

SILAS PORTER,
Counsel for Defendent in Error,
for the Purposes of these Motions.

Motion of Defendant in Error to Dismiss or Affirm Under Fifth Clause of Rule 6.

Comes now the defendant in error, Andrew Herman, a minor, by his next friend, Martin Herman, by his counsel appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree to which the said writ of error is directed is a judgment or decree of the Supreme Court of one of the United States, to-wit, of the State of Kansas, and because the want of jurisdiction is apparent from the record.

And the said defendant in error, by counsel, as aforesaid, also moves the court to affirm the said judgment or decree to which said writ of error is

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directed, because although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, and because it is manifest from the record that the question on which the jurisdiction of this court depends is so frivolous as not to need further argument, and because there is no merit in the said writ of error.

STATEMENT.

Andrew Herman, a minor, by his next friend, Martin Herman, brought this action in the Court of of Common Pleas of Wyandotte County, Kansas, September 18th, 1897, against the Union Terminal Railway Company, a resident corporation, and the Kansas City Suburban Belt Railway Company, a Missouri corporation, to recover $10,000 for the loss of a foot, charging them in his petition as joint tort-feasors.

The petition alleged among other things that the resident corporation built and owned the road, and the non-resident corporation operated it in connection with the other company. (Rec. p. 1.)

The Suburban Belt Railway Company, upon the answer day presented their petition and bond for removal in proper form upon the ground of a separable controversy. (Rec. p. 4, 5, 6.)

The State Court denied the petition for removal, (Rec. p. 7), and a transcript was filed in the Circuit Court of the United States, and upon motion the cause was remanded to the State Court. (Rec. p. 15).

Upon the first trial, which resulted in a disagreement of the jury, each defendant at the conclusion of the plaintiff's evidence filed a separate demurrer to the evidence (Rec. p. 10-11). The court overruled the demurrer of the Suburban Belt Railway Company and sustained the demurrer of the Union Terminal Company, (Rec. p. 11), to which ruling of the court sustaining the demurrer of the resident defendant plaintiff below excepted. (Rec. p. 12).

Thereupon, in the midst of the trial, the Kansas City Suburban Belt Railway Company, plaintiff in error, filed a new petition and bond for removal, reciting the facts as above, (Rec. p. 12), which the State Court denied. (Rec. p. 16).

The trial then proceeded and resulted in a mistrial, on account of the failure of the jury to agree. This was on October 20th, 1897, (Rec. p. 9). On the discharge of the jury plaintiff below obtained leave of court to file an amended petition, and subsequently did file an amended petition reducing the ad damnum to $1,999.00. (Rec. p. 17-20). The cause was subsequently tried on the amended pe-

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tition, and resulted in a verdict and judgment June 27th, 1899, in favor of plaintiff below for $1,500.00.

The cause was appealed to and affirmed by the Kansas Court of Appeals, and again appealed to the Supreme Court of Kansas, where the decision was once more affirmed.

BRIEF AND ARGUMENT.

There is color for the motion to dismiss under the authority of Whitcomb vs. Smithson, 175 U. S., 635.

The record shows that the Circuit Court remanded the case to the State Court and ruled that there was no separable controversy.

The contention here is that when the trial court at the conclusion of plaintiff's testimony sustained the demurrer of the resident defendant, the result was to make the case there and then removable, and upon this theory a second petition for removal was presented, and the error complained of is the refusal of the State Court to grant this second petition for removal.

But this was a ruling upon the merits adverse to plaintiff below, and to which he saved his exceptions, and is squarely within the scope of the decision in Whitcomb vs. Smithson, *supra*.

The only difference between this case and Whitcomb vs. Smithson, *supra*, is that, in this case

the first petition for removal did not allege as one of the grounds for removal that the Union Terminal Railway Company was joined fraudulently, while that was one of the grounds alleged in the first petition in Whitcomb vs.. Smithson.

I.

First, we say that the ruling of the State Court upon the demurrer to plaintiff's evidence being *in invitum* could not make the case removable during the progress of the trial.

Whitcomb vs. Smithson, *supra.*

Cited and affirmed in Chess. & O. Ry. Co. vs. Dixon, 179 U. S., 131.

II.

Second, plaintiff in error does not bring here the record of the trial showing the evidence offered by defendant in error (plaintiff below) in support of the cause of action against the Union Terminal Railway Company, and this court has only the averments made in the petition for removal, which state that "no evidence was offered to sustain a cause of action against the resident defendant," upon which to determine how much or how little was in fact offered.

The plaintiff below filed an answer to the second petition for removal (Rec. p. 15) explaining why certain evidence relied upon was not intro-

duced; but there is nowhere an admission that no evidence was introduced.

If a non-resident defendant can, during the progress of the trial on the merits, make a case immediately removable by presenting a petition for removal at the conclusion of plaintiff's testimony, simply alleging that "no evidence was offered to sustain a joint cause of action as against the resident defendant," great confusion would result, because counsel frequently differ upon the proposition as to whether any evidence to sustain this or that point has in fact been given.

III.

Third, after the mis-trial October 20th, 1898, while the court had jurisdiction of the cause and all the parties, plaintiff below had the right by leave of court to amend his petition and reduce the *ad damnum*.

Neither of the petitions for removal had any life, force or effect if the case was not removable at the time they were respectively presented.

We respectfully ask on affirmance.

W. B. Sutton,
Silas Porter,
Counsel for said Defendant in Error.

IN THE

Supreme Court of the United States.

October Term—1902.

No. 321.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY,

PLAINTIFF IN ERROR.

vs.

ANDREW HERMAN, a minor, by his next friend, Martin Herman, and the UNION TERMINAL RAILWAY COMPANY,

DEFENDANTS IN ERROR.

Reply Brief of Defendant in Error on Motion to Dismiss or Affirm.

I.

Plaintiff in error in his brief assumes that it appears from the record that upon the first trial in the state court plaintiff "failed to offer any evidence whatever against the resident defendant,"

and he now argues that this was a voluntary abandonment of any action against the resident defendant and that it amounts to the same as a voluntary dismissal.

We cannot permit this assumption to go unchallenged. None of the evidence offered appears in the record. Not one syllable. How, then, can this court, from the record here, determine how much or how little was in fact offered as against the resident defendant?

It is true plaintiff in error alleged in the second petition for removal that there had been no evidence offered to sustain a cause of action as against the resident defendant, but that was a mere assertion of a conclusion of fact and of law. The ruling of the court sustaining the demurrer was necessarily couched it the same language it would have been had plaintiff below offered the testimony of a dozen witnesses to prove liability against the resident defendant, provided the court considered the evidence insufficient. It cannot be assumed that because the court sustained the demurrer on the grounds that evidence offered was not sufficient that there was no evidence of any kind offered.

If there had been "no evidence whatever" offered as against the resident defendant, plaintiff in error should not have demurred to the evidence, but should have moved to dismiss, or for judgment

as to the resident defendant. On the contrary, read their "Demurrer to Evidence:"

"And now comes the defendant, The Union Terminal Railway Company, at the close of the evidence of the plaintiff, and demurs to the evidence for the reason that the same is not sufficient to establish a cause of action in favor of plaintiff and against the said defendant, The Union Terminal Railway Company." (Rec. p. 11.)

And then follows the ruling of the court:

"And now the arguments of counsel upon said demurrers are fully heard and the court being fully advised in the premises, sustains the said demurrer of the Union Terminal Railway Company and enters judgment in favor of said defendant and against the plaintiff for its costs, *to which ruling of the court the plaintiff at the time excepted.*" (Rec. p. 11)

There is no finding of the court that no evidence of any kind was introduced. The affidavit of counsel for plaintiff below explains why certain evidence relied upon was not in fact produced, clearly showing good faith on the part of the plaintiff below.

II.

We did not make this record and are not in any manner responsible for its failure to contain the evidence upon the first trial.

The fact is, plaintiff in error did not appeal from the first trial because it was a mis-trial. He

did appeal from the second trial, and the record here only shows the evidence upon the second trial. But he now complains of error occurring upon the first trial without any pretense of having a record of the evidence, the lack of which he says made the case then removable.

III.

The plaintiff below excepted to the ruling of the court sustaining the demurrer, and had the trial not resulted in a mis-trial, plaintiff below could have gone to the higher courts of the state upon that exception. This was insisting until the close of the trial upon the liability of the resident defendant, and this case is clearly within the scope of Whitcomb vs. Smithson, 175 U. S., 635.

Respectfully submitted,

SILAS PORTER,

W. B. SUTTON,

Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 321.—October Term, 1902.

The Kansas City Suburban Belt Railway Company, Plaintiff in Error, *vs.* Andrew Herman, a Minor, by his next friend, Martin Herman, and The Union Terminal Railway Company. } In error to the Supreme Court of the State of Kansas.

[November 3, 1902.]

This was an action brought by Andrew Herman, a minor, by his next friend, in the Court of Common Pleas of Wyandotte County, Kansas, September 18, 1897, against the Union Terminal Railway Company, a corporation of Kansas, and the Kansas City Suburban Belt Railway Company, a corporation of Missouri, to recover damages for injuries inflicted through their joint or concurrent negligence.

The Belt Railway Company, October 18, 1897, filed a verified petition and bond for removal in proper form on the ground of a separable controversy; which petition alleged the controversy between plaintiff and petitioner to be distinct and separable from that between plaintiff and the Union Terminal Railway Company, on these grounds:

"1. Defendant, The Union Terminal Railway Company, owns, repairs and maintains the railroad mentioned in plaintiff's petition. Your petitioner has no interest therein, except that it has leased same and pays certain yearly rental for the use of said tracks. All of the locomotives, engines and cars running over said railroad are the property of your petitioner, or subject to its control. Defendant Terminal Company has no control over the operation of trains and has no employees in train service. Defendant The Union Terminal Railway Company is responsible for the condition of the track and your petitioner, and none other, for the acts and doings of all persons operating trains.

"2. The plaintiff herein has declared upon two distinct causes of action: First: for maintaining a defective switch; and second: for negligent operation of a train of cars, the first of which, if true, is negligence chargeable against defendant The Union Terminal Railway Company, and the second, if true, is negligence chargeable against your petitioner.

"3. The train of cars mentioned in the petition was operated by your petitioner as averred. All of the parties in charge thereof were in your petitioner's employ and none other.

"4. By reason of the foregoing your petitioner says that whatever cause of action plaintiff has for negligent operation of said railroad train lies against your petitioner exclusively."

The application for removal was heard February 5, 1898, and upon argument denied. The Belt Company thereupon filed a transcript of the record in the Circuit Court of the United States for the District of Kansas, and plaintiff made a motion to remand, which was sustained by the Circuit Court, and the cause remanded to the State court "on the —— day of May, 1898." Each of the two railroad companies defendant then filed its separate demurrer, May 28, 1898, assigning as causes, misjoinder of parties; and that plaintiff had not stated a cause of action or facts sufficient to constitute a cause of action against it. These demurrers were severally overruled, and the defendants severally answered. The cause came on for trial October 18, 1898, and on October 20, at the close of the evidence for plaintiff, each company filed its separate demurrer to the evidence on the ground that the same was not sufficient to establish a cause of action against it. The court sustained the demurrer of the Terminal Company, the Kansas corporation, and entered judgment in its favor, to which ruling of the court plaintiff at the time excepted; and the court overruled the demurrer of the Belt Company, the Missouri corporation, to which ruling the Belt Company excepted. Thereupon the Belt Company filed a second verified petition for removal, which, after rehearsing the prior proceedings, thus continued:

"And the defendant further says that no evidence was offered or introduced by plaintiff or attempt made to show a cause of action against said Union Terminal Railway Company; that said Union Terminal Railway Company was joined with this defendant fraudulently and for the sole purpose of preventing a removal of this cause to the Circuit Court of the United States, and with no purpose or intent of attempting to show any cause of action against it.

"This defendant now here shows to the court that there is a separable controversy and that the plaintiff's cause of action exists against the defendant alone and in nowise against the said defendant, The Union Terminal Railway Company. That no cause of action ever existed against the defendant, The Union Terminal Railway Company, as plaintiff at all times well knew."

In response to this petition plaintiff filed without objection an affidavit, which stated, among other things, that it was not true "that plaintiff joined the Union Terminal Railway Company as defendan therein fraudulently or for the purpose of giving this court jurisdiction of the petitioner, but on the contrary, plaintiff avers that said action was brought in good faith against both defendants as joint tort feasors, and that plaintiff believed in good faith that he has a joint cause of action against both defendants, and had subpœnas issued for witnesses to prove directly the responsibilities of the Union Terminal Railway Company for the injuries sustained by plaintiff, but that on account of the removal of a witness from the State, plaintiff was at the last moment unable to obtain certain testimony, which, if introduced, would have tended to prove the joint liability of said defendants.

That plaintiff has excepted to the ruling of the court sustaining a demurrer to the evidence on the part of the Union Terminal Railway Company in the trial of this case, for the purpose of preserving his rights in this action against both of said defendants jointly." And it was further stated that counsel had relied on the production, on notice which had been given, of "writings showing the relations existing between the two defendant companies in the operation and maintenance of their lines of railroad where the injuries were received," and on an agreement with counsel for both of the defendants to admit the facts as to the relations between said companies, which, when it was too late to adduce other testimony, was not fulfilled.

The application for removal was overruled, and the Belt Company excepted, but took no bill of exceptions embodying the evidence to which the demurrers had been directed. The trial then proceeded, and resulted in a disagreement of the jury.

Plaintiff subsequently filed an amended petition reducing the damages claimed to less than $2,000, and the cause was again tried, and resulted in a verdict and judgment in favor of plaintiff for $1,500. The cause was carried to the Kansas Court of Appeals and the judgment affirmed, and thence to the Supreme Court of Kansas with like result. *Kansas City Suburban Belt Railway Company* v. *Herman et al.*, 68 Pac. Rep. 46.

A writ of error from this court was then allowed by the Chief Justice of Kansas, and citation issued to and acknowledged on behalf of Herman, and the Union Terminal Railway Company. The case was submitted on motions to dismiss or affirm.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The question is whether the State court erred in denying the second application for removal, and in view of our previous rulings in respect of such applications we think there was color for the motion to dismiss. And reference to two recent decisions of this court will indicate the reasons for our conclusion that the motion to affirm must be sustained.

In *Powers* v. *Chesapeake & Ohio Railway Company*, 169 U. S. 92, the railroad company filed its petition for removal on the grounds of separable controversy, and that its co-defendants were fraudulently and improperly joined in order to defeat the company's right of removal The transcript of the record of the State court was filed in the Circuit Court of the United States, and a motion to remand was sustained for want of separable controversy. Thereafter, when the case was called for trial in the State court, plaintiff discontinued his action against the co-defendants, and the company filed a second petition for removal, which was denied. The company then again filed a transcript of the record of the proceedings in the

Circuit Court, and plaintiff again moved to remand, and the Circuit Court, being of opinion that plaintiff had fraudulently joined the co-defendants in order to defeat the removal and was estopped to deny that the second petition for removal was filed in time, denied the motion to remand. 65 Fed. Rep. 129. Final judgment was afterwards rendered in the company's favor, and a writ of error was sued out from this court on the sole ground that the cause had not been properly removed into the Circuit Court. The judgment was affirmed, and it was held that "when the plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time." But we did not pass upon the questions of fraudulent joinder and estoppel because the application was seasonably made, and stated sufficient ground for removal apart from fraud.

In *Whitcomb* v. *Smithson*, 175 U. S. 635, the action had been brought by Smithson, in a Minnesota court, against the Chicago Great Western Railway Company and H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Railroad Company, to recover for personal injuries inflicted, while he was serving the Chicago company as a locomotive fireman, in the collision of the locomotive on which he was at work, and another locomotive operated by Whitcomb and Morris as receivers. The Chicago company answered the complaint and the receivers filed a petition for the removal of the cause into the Circuit Court of the United States for Minnesota, alleging diverse citizenship; that they were officers of the United States court; that the controversy was separable, and that the railway company was fraudulently made a party to prevent removal. Plaintiff answered the petition and asserted that the company was made party defendant in good faith, and not for that purpose. An order of removal was entered and the cause sent to the Circuit Court, which thereafter remanded it to the State court. Trial was had, and after the testimony was closed counsel for the Chicago company moved that the jury be instructed to return a verdict in behalf of that defendant, which motion was granted. The receivers then presented a petition for removal, but the court denied the application, and exception was taken. The court thereupon instructed the jury to return a verdict in favor of the Chicago company, which was done, and the cause went to the jury, which returned a verdict against the receivers and assessed plaintiff's damages. Judgment was entered on the verdict, and subsequently affirmed by the Supreme Court of Minnesota on appeal, and a writ of error was sued out from this court. Motions to dismiss or affirm were submitted, and we held that there was color for the motion to dismiss, and affirmed the judgment. We there said: "The contention here is that when the trial court determined to direct a verdict in

favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired the right of removal which was not concluded by the previous action of the Circuit Court. This might have been so if when the cause was called for trial in the State court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*."

It was pointed out that the ruling of the trial court "was a ruling on the merits and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried." We held also that the judgment of the Circuit Court in remanding the cause, when removed on the first application, covered the question of fact as to good faith in the joinder, and added that "assuming, without deciding, that that contention could have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it."

It will be perceived that: In *Powers* v. *Railway Company*, two applications for removal were made; they were severally denied; and the record was filed in the Circuit Court of the United States in each instance. Remand was granted on the first removal and denied as to the second. Plaintiff voluntarily discontinued his action against the company's co-defendants before trial, thereby leaving the case pending between citizens of different States, and no necessity to dispose of the issue as to fraudulent joinder arose.

In *Smithson* v. *Whitcomb* two applications for removal were made and they were severally denied, but the record was filed in the Circuit Court of the United States only on denial of the first application, and the case was only once remanded. Plaintiff did not discontinue his action against either of the defendants and went to trial against both, and the trial court directed a verdict in favor of one of them. The ruling was on the merits and *in invitum*.

In the case at bar, two applications for removal were made, and they were severally denied, but the record was filed in the Circuit Court of the United States only on the denial of the first application, and the case was only once remanded. Plaintiff did not discontinue as to either of the de-

fendants and went to trial against both, and the trial court sustained in favor of one of them a demurrer to the evidence. Here again the ruling was on the merits and *in invitum.*

The first petition in terms raised no issue of fraudulent joinder, but the second petition did. Was that issue seasonably raised, and, if so, ought the case to have been removed? The second petition did not state when petitioner was first informed of the alleged fraud, but left it to inference that it was not until after plaintiff had introduced his evidence, notwithstanding the averments in the first petition.

But apart from this, the averments of fraud were specifically denied, and, so far as this record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case. *Plymouth Mining Company* v. *Amador Canal Company,* 118 U. S. 270.

Doubtless the general rule is that issues of fact raised on petitions for removal should be tried in the Circuit Court of the United States, but petitioner did not file the record in the Circuit Court, and as the issue was correctly disposed of, it would be absurd to send the case back to be removed for the purpose of being remanded, and we are obliged to deal with the record as it is. Nor was the evidence introduced on plaintiff's behalf, and demurred to, made part of the record, and the bare fact that the trial court held it insufficient to justify a verdict against the Terminal Company was not conclusive of bad faith. The trial court may have erred in its ruling, or there may have been evidence which, though insufficient to sustain a verdict, would have shown that plaintiff had reasonable ground for a *bona fide* belief in the liability of both defendants. In these circumstances, the case comes within *Smithson* v. *Whitcomb,* and the judgment must be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

31474